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No. _____

In The

Supreme Court of the United States

ANY AND ALL RADIO STATION TRANSMISSION EQUIPMENT; RADIO FREQUENCY POWER AMPLIFIERS, RADIO FREQUENCY TEST EQUIPMENT, AND ANY OTHER EQUIPMENT ASSOCIATED WITH OR USED IN CONNECTION WITH THE TRANSMISSION AT 97.7 MHZ, LOCATED AT 1400 LAUREL AVENUE, APARTMENT 1109, MINNEAPOLIS, MN 55403, and

ALAN FRIED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a micro-radio broadcaster entitled to raise a constitutional defense to the U.S. government's forfeiture action in the District Court, where the Government initiated the proceeding and where 47 U.S.C. § 504(a), the statute governing the enforcement of forfeitures, vests jurisdiction in the District Court?

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 207 F.3d 458 (8th Cir. 2000), and is reprinted in the Appendix. A-1 – A-13. The original opinion of the Eighth Circuit panel, which was vacated by the Eighth Circuit on Grant of Rehearing of August 2, 1999, was reported at 169 F.3d 548 (8th Cir. 1999), and is reprinted in the Appendix at A-14 – A35. The opinion of the United States District Court for the District of Minnesota is reported at 976 F. Supp. 1255 (D. Minn. 1997), and is reprinted in the Appendix. A-36 – A-45.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered on March 27, 2000. A-1. The Order of the Eighth Circuit denying the petition for rehearing and for rehearing en banc (with four judges voting to rehear the case) was entered on July 5, 2000. A-46.

This Court has jurisdiction to review the judgment of the Eighth Circuit under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

47 U.S.C. § 504(a). Forfeitures.

(a) Recovery. The forfeitures provided for in this Act shall be payable into the Treasury of the United

States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this Act in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: Provided, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this Act shall be a trial de novo: Provided further, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties herein provided. It shall be the duty of the various district attorneys under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

47 U.S.C. § 402(a)-(b). Judicial review of Commission's orders and decisions.

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

(b) Right to appeal. Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide inter-LATA services under section 271 of this Act whose application is denied by the Commission.

28 U.S.C. § 2342. Jurisdiction of court of appeals.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of –

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of –

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (*46* U.S.C. App. 802, 803, 808, 835, 839 and 841a) or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to –

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (*46 U.S.C. App. 817d*(d) or 817e(d));

(iv), (v) [Redesignated]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

STATEMENT OF THE CASE

A. Introduction

Petitioner Alan Fried ("Fried") was a "micro-broadcaster," a person who owns and operates a low-power radio station. A-3. Micro-radio stations typically operate at less than 100 watts. *Id.* Fried used a vacant space in the broadcast spectrum at 97.7 MHZ on the FM dial in downtown Minneapolis. *Id.* The station, known as The BEAT, provided alternative dance music of a type not broadcast by any other radio station in the Twin Cities metro area, along with programming by alternative music disc jockeys and producers from the community. *Id.* It broadcast at approximately 20 watts to an area spanning about six miles in radius. *Id.* The BEAT's signal created no interference with any other stations. *Id.*

Fried did not a have a broadcast license for his micro-radio station. A-3. Under federal law, it is unlawful to

broadcast a radio signal without a license. However, current regulations of the Federal Communications Commission ("FCC"), as well as those enforced when this case began, *see* 47 C.F.R. § 73.512(c), prohibit Fried and others like him from gaining a license to micro-broadcast. A-3 – A-4.[1] This regulatory anomaly placed micro-broadcasters between the proverbial rock and a hard place: federal law makes it illegal to broadcast without a license but the FCC would not grant licenses to stations under 100 watts. It also led to a major controversy in the last several years between the FCC and micro-broadcasters who seek to broadcast diverse community-based programming using relatively inexpensive and therefore widely accessible, broadcasting equipment. Before turning to the specifics of Fried's case, it is important to set forth briefly the background of micro-broadcasters' conflict with the FCC.

B. A Brief Background History Of Micro-Radio

Before 1980, Low Power Class D licenses to serve communities were granted by the FCC. *See* Walker,

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[1] As set forth in more detail below, the FCC's refusal to license micro-broadcasters has been in effect since 1978, except in Alaska. The FCC has recently promulgated rules allowing micro-broadcasters to apply for licensure, but flatly disallowing any micro-broadcaster who previously engaged in unlicensed broadcasting (which would include Fried) from doing so. *See FCC Report and Order in Creation of Low Power Radio Service*, 15 F.C.C.R. 2205, FCC 00-19, MM Docket No. 99-25, § 54 (Jan. 27, 2000). Legislation that would repeal even the limited licensure for new micro-broadcasters proposed by the FCC passed the House of Representatives on April 13, 2000 and is currently pending in the Senate. *See* H.R. 3439, S. 3020, *Radio Broadcasting Preservation Act of 2000*.

"Rebel Radio: The FCC's Absurd New Crusade," *The New Republic*, March 9, 1998, pp. 10-11. The Class D license allowed community and educational stations to broadcast in the noncommercial portion of the spectrum (the lower end of the FM dial). *Id.* These stations began to multiply, creating an outlet for community and educational radio. *Id.* In 1978, however, the FCC changed its rules by announcing that it would no longer license stations of 10 watts or less (except in Alaska, which has its own system of regulating the spectrum). *See* 47 C.F.R. §§ 73.211(a); 73.511(a) ("[n]o new noncommercial educational station will be authorized with less power than minimum power requirements for commercial class A facilities"); *Changes in Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240 (1978) ("*Second Report and Order*"), *modified*, 70 F.C.C.2d 972 (1979); *see also* A-3 – A-4.

Therefore, after 1980 (when the rule went into effect), all FM stations had to maintain a minimum effective radiated power of 100 watts. *Id.* This change was justified under the FCC's "public interest convenience and necessity" mandate, ostensibly to ensure more "efficient" and "effective" use of educational noncommercial FM radio service. *Second Report and Order*, 69 F.C.C.2d at 248. As a result, no new Class D applications could be filed with the FCC. 47 CFR § 73.512(c) ("[e]xcept in Alaska, no new Class D [micro-radio station] applications nor major change applications by existing Class D stations are acceptable for filing except by existing class D stations seeking to change frequencies").

This regulatory scheme resulted in pockets or "holes" of unused parts of the broadcast spectrum too small to

accommodate a full-power commercial station, but perfect for small broadcasters. Walker, *id.* During this same time, the cost of starting a low-power station dropped dramatically. *Id.* Due to technological advancements and the declining cost of equipment, micro-broadcasters, who otherwise would not have an opportunity to communicate, could now more easily and with little expense create and operate micro-radio stations of less than 100 watts. *Id.* The FCC regulations governing the issuance of licenses began to clash with technological advancements and the desire of individuals to create alternatives to commercial radio in their communities. *Id.* Many saw themselves as part of a community radio movement, providing an alternative to corporate and public radio. *Id.* Micro-radio formats range from non-mainstream political commentary to religious and ethnic programming to music styles not typically available on commercial radio, such as swing and alternative dance music and even classical and big band. *Id.*; *see also* A-4.

Until the mid-1990s, the FCC largely overlooked micro-radio operators, unless there were complaints of interference with existing stations. *See* Walker, *id.* However, in recent years, the FCC dramatically stepped up enforcement against micro-radio broadcasters. *Id.* As the instant case aptly demonstrates, the FCC now goes after even those broadcasters that do not interfere with existing stations or cause any harm to licensed broadcasters or anyone else. Fried and many others like him have attempted to challenge the FCC's policies as a violation of the First Amendment's guarantee of free speech.

C. Proceedings Below

While he was broadcasting The BEAT, Fried received a warning letter, dated August 12, 1996, from the FCC, directing him to cease broadcasting. A-37. The letter gave Fried ten days to respond, and he timely did so on August 19, 1996. *Id.* In his response, Fried challenged the constitutionality of the FCC's micro-radio prohibition. *Id.* He also requested a waiver of the FCC's ban on licensing micro-broadcasters to permit him to lawfully broadcast. *Id.* The FCC never responded to his request for a waiver and, over four years later, has still not responded to Fried's request nor issued him any type of administrative order. *Id.*[2] Instead, the United States government ("the Government") pursued Fried by initiating an *in rem* forfeiture action in Federal District Court against his equipment pursuant to 47 U.S.C. § 510. A-38. It seized Fried's equipment, which it has never returned, in early November 1996, pursuant to Court Order. *Id.* Fried asserted a claim of ownership to the equipment and filed an Answer in the forfeiture proceeding. *Id.* His Answer raised numerous affirmative defenses, including challenging the constitutionality of the FCC's micro-radio licensing ban on First Amendment grounds. *Id.*

The District Court, where the Government brought the case, granted the Government's Motion for Judgment on the Pleadings, holding that Fried could not raise his defenses in the Government's forfeiture proceeding because the Court of Appeals, not the District Court, has exclusive jurisdiction to adjudicate any challenge to the

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[2] The district court below assumed for purposes of its analysis that Fried had duly requested a waiver. A-37.

validity of FCC regulations. *U.S. v. Any and All Radio Station Transmission Equip., et al.*, 976 F. Supp.2d 1255 (D. Minn. 1997), reprinted in the Appendix at A-36 – A-45. The District Court's ruling noted that there were conflicting jurisdictional provisions at issue in the case: (1) 47 U.S.C. §§ 402(a)-(b), the statute governing review of FCC administrative action, which vests jurisdiction to review final FCC orders in the U.S. Courts of Appeals; and (2) 47 U.S.C. § 504(a), the specific statute governing forfeiture actions, which gives District Courts jurisdiction over forfeiture proceedings such as Fried's case. *Id.* at 1258, A-42. Section 504(a) further requires the Government to seek forfeiture in a "trial de novo" in the District Court. *Id.* The District Court in the instant matter observed that the statutes "seem to mandate exclusive jurisdiction in two different jurisdictions." *Id.* Nevertheless, the District Court held that it had jurisdiction over the Government's claims but not over Fried's defenses and ruled against Fried. *Id.* at 1259, A-44.

Fried appealed the District Court decision to the U.S. Court of Appeals for the Eighth Circuit, claiming that he was entitled to raise his constitutional defenses in the District Court as part of the forfeiture proceeding, rather than initiating a separate challenge before the FCC and then, eventually, in the Court of Appeals. A-23. He maintained that the forfeiture statute, 47 U.S.C. § 504(a), gives the District Court exclusive jurisdiction to hear forfeiture suits, including adjudication of his constitutional defenses. A-23. The Eighth Circuit initially upheld Fried's position, ruling in a 2-1 decision that the District Court erred in disallowing the constitutional defenses to be raised, and remanded the case to the District Court. *U.S. v. Any and All Radio Transmission Equip., et al. (Laurel*

Avenue), 169 F.3d 548 (8th Cir. 1999), reprinted in the Appendix at A-14 – A-35.

At the Government's request, the Eighth Circuit vacated the earlier opinion and ordered a rehearing by the same Panel, which issued a new ruling on March 27, 2000, in favor of the Government. *U.S. v. Any and All Radio Station Transmission Equip., et al. ("Laurel Avenue")*, 207 F.3d 458 (8th Cir. 2000), reprinted in the Appendix at A-1 – A-13. In this opinion, the Eighth Circuit ruled that Fried could not raise constitutional defenses in the District Court. *Id.*, A-10 – A-13. Instead, to raise a constitutional argument, he would have to file an application for a waiver of the licensing prohibition with the FCC, (which he did and to which the FCC never responded), with the appropriate Court of Appeals reviewing the outcome of the proceeding. *Id.*, A-13. Fried timely filed a Petition for Rehearing and for Rehearing En Banc. A-46. On July 5, 2000, the Eighth Circuit denied the petition. Chief Judge Wollman, Judge Richard S. Arnold, Judge Loken and Judge Hansen of the Eighth Circuit would have granted the Petition. A-46. Fried now files the instant petition with this Court.

REASONS FOR GRANTING WRIT

I. THE CIRCUITS HAVE CREATED A DIRECT, IRRECONCILABLE SPLIT OVER WHICH COURT SHOULD HEAR CONSTITUTIONAL DEFENSES IN A CIVIL FORFEITURE PROCEEDING INITIATED BY THE UNITED STATES GOVERNMENT.

The issue in this case is whether Federal District Courts have jurisdiction to consider the constitutionality

of FCC regulations in forfeiture proceedings brought by the Government. The Eighth Circuit below described the issue as "an important one for the statutory scheme created by Congress for the regulation of broadcasting" and for which the Panel recognized there is no "precise precedent." *Laurel Avenue*, 207 F.3d at 462, A-11.

Not only is the issue raised in this case an "important one," as the Eighth Circuit recognized, but it arises in the context of a highly unsettled legal landscape in which there is a clear split among circuits. The Second Circuit recently framed the conflict:

> Two courts of appeals have considered the similar question of whether § 504 of the Communications Act, which confers on the district courts jurisdiction to hear in rem forfeiture suits brought by the government against unlicensed broadcasters, *see id.* § 504(a), allows the district courts to consider constitutional challenges to the microbroadcasting regulations when these are asserted as defenses to forfeiture. The Eighth Circuit found such challenges barred on the ground that "[a] defensive attack on the FCC regulations is . . . an evasion of the exclusive jurisdiction of the Court of Appeals." *United States v. Any & All Radio Station Transmission Equip. ("Laurel Avenue")*, 207 F.3d 458, 463 (8th Cir. 2000). The Sixth Circuit came to the opposite conclusion, reasoning that it was unlikely that Congress intended to deprive defendants in forfeiture actions of the ability to raise constitutional defenses to those actions. *See United States v. Any & All Radio Station Transmission Equip. ("Maquina Musical")*, 204 F.3d 658, 667 (6th Cir. 2000).

Prayze FM v. F.C.C., 214 F.3d 245, 250-51 (2d Cir. 2000).[3]

The clear split of authority between the Eighth and Sixth Circuits concerns interpretation of two different statutory provisions regulating telecommunications. Title 47 of the United States Code regulates communications via "telegraphs, telephones, and radiotelegraphs." Chapter 5 of Title 47, the Communications Act, governs "wire or radio communications." Within Chapter 5 are the two competing provisions at issue here. Subchapter IV, entitled "Procedural and Administrative Provisions," governs the administrative review of FCC decisions. 47 U.S.C. §§ 401-416. Subchapter V, entitled "Penal Provisions: Forfeitures," addresses the imposition and recovery of forfeitures for violations of the Communications Act. 47 U.S.C. §§ 501-559. The chart on page A-68 of the Appendix illustrates this statutory framework.

Even though the Government pursued Fried under Subchapter V of the Act governing forfeitures, the Eighth Circuit in *Laurel Avenue* based its decision on Subchapter

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[3] While noting the split between the Eighth and Sixth Circuits, the Second Circuit in *Prayze FM* declared that it "need not, however, resolve [this] jurisdictional issue today." *Id.*, 214 F.3d at 251. The court assumed that it had jurisdiction and went on to the merits, ruling against the micro-broadcaster's First Amendment arguments and granting the FCC a preliminary injunction. The case, however, is not relevant to the issue presented in this petition. The issue here is jurisdiction, which in no way depends on the ultimate merits of either the Petitioner's or the FCC's claims. Of course, Petitioner disagrees with the Second Circuit on his First Amendment claim, but seeks, through this Petition, simply to establish his ability to raise a constitutional argument at all, something the Eighth Circuit explicitly disallowed.

IV of the Communications Act, governing FCC procedural and administrative provisions. In particular, the court based its ruling upon 47 U.S.C. § 402. That statutory provision, in conjunction with 28 U.S.C. § 2342, prescribes that actions to "enjoin, set aside, annul, or suspend any order of the Commission" must be brought in the Court of Appeals, which has exclusive jurisdiction over all final orders of the FCC.[4] The Eighth Circuit held that any challenge to FCC regulations must be heard in the Court of Appeals, whether they are presented as affirmative claims or defenses. *Laurel Avenue*, 207 F.3d at 462-63, A-12 – A-13. It then determined that Fried's constitutional claims constituted a "defensive attack" on the FCC's licensing regulations, which it characterized "as much an evasion of the exclusive jurisdiction of the Court of Appeals" as if Fried had made a "preemptive strike by seeking an injunction." *Laurel Avenue*, 207 F.3d at 463, A-12. The Eighth Circuit held that Fried's remedy was to apply for a license and request a waiver (which he had already done but the FCC has ignored for years), and then appeal that decision to the Appellate Court pursuant to the procedural and administrative provisions of Subchapter IV. *Id.*, A-13.

In contrast, the Sixth Circuit in *Maquina Musical*, *supra*, (reprinted in the Appendix at A-47 – A-67), based

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[4] The Appellate Court to which a petitioner must apply depends upon the type of FCC action at issue. 47 U.S.C. § 402(b) specifies certain actions that are reviewed by the D.C. Circuit Court of Appeals and others that are reviewed by the circuit court "in which the petitioner resides. . . . " *See* 28 U.S.C. § 2343.

its ruling on Subchapter V of the Act governing both monetary forfeitures and forfeitures of communications devices. For the Government to enforce any type of forfeiture under the Act, it must bring an action for recovery of the forfeiture in District Court pursuant to 47 U.S.C. § 504(a), which vests exclusive jurisdiction in the District Court to adjudicate forfeiture enforcement suits brought by the Government.

> **The forfeitures provided for in this chapter** . . . shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the **district** where the person or carrier has its principal operating office. . . . **[A]ny suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo.** (emphasis added).[5]

Focusing its analysis on 47 U.S.C. § 504, the Sixth Circuit in *Maquina Musical* determined that the District Court, not the Appellate Court, is the proper forum for adjudication of a micro-broadcaster's constitutional challenges when the Government institutes a forfeiture action. In *Maquina Musical*, the Court considered two consolidated cases in which District Courts held that the doctrine of primary jurisdiction barred consideration of micro-broadcasters' constitutional defenses. *Id.*, 204 F.3d at 663-64, A-47 – A-56. Reversing, the Sixth Circuit

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[5] This provision is fortified by 47 U.S.C. § 505, which provides that venue of all trials brought "for any offense under this chapter" shall be in U.S. District Court.

rejected the District Courts' application of primary jurisdiction and remanded both cases back to the District Courts for full adjudication, including consideration of constitutional defenses. *Id.* at 667-668, A-64 – A-66. Like the Eighth Circuit, the Sixth Circuit also considered the effect of § 402(a) but held that it was inapplicable because no "final order" of the FCC was at issue:

> Congress presumably could have created a streamlined forfeiture remedy that excluded certain defenses by giving claimants the opportunity to raise those defenses in some other forum. But it did not do so. Forfeiture actions, although normally civil, are quasi-criminal in nature. . . . **We believe that this makes it even less likely that Congress enacted a statute that allows the government to forfeit a person's property while denying the right to defend himself by challenging the legal basis of the government's forfeiture case.**

Id. at 667 (emphasis added), A-63 – A-64.

The Sixth Circuit based its holding in part on the earlier vacated decision in *Laurel Avenue*. In that decision, Judge McMillian held that 47 U.S.C. § 402, the jurisdictional statute that assigns review of final FCC orders to the Appellate Court, is a general statute. A-23 – A-29. In contrast, 47 U.S.C. § 504, the jurisdictional statute that assigns forfeiture actions to a de novo trial in the District Court, is a specific statute. *Id.* Therefore, Judge McMillian held that the specific statute superseded the general one and that "exclusive jurisdiction" rested with the district court. *Id.*

In the same case, Judge Morris Arnold wrote separately from Judge McMillian, but also ruled in favor of Fried for two separate reasons: first, defendants in federal court, such as Fried, may always raise their defenses when they are sued by the Government, unless Congress has explicitly provided a different forum for them to do so; and second, the Courts of Appeals only have exclusive jurisdiction over final orders of the FCC, and FCC regulations are not final orders. A-31 – A-32. Judge Arnold distinguished the language in 28 U.S.C. § 2342 governing other agencies, including the Secretary of Transportation, the Federal Maritime Commission and the Interstate Commerce Commission. Congress gave exclusive jurisdiction to the Courts of Appeals over all "rules, *regulations*, or final orders" of those agencies, whereas it only gave exclusive jurisdiction over appeals from final "*orders*" of the FCC. A-31 – A-32; 28 U.S.C. § 2342 (emphasis added).

Although the Eighth Circuit Panel in *Laurel Avenue* subsequently vacated its earlier opinion, the Sixth Circuit's opinion in *Maquina Musical*, which relied in part on the now-vacated Eighth Circuit opinion, has not been changed or subsequently amended. The opinion is final and remains good law in the Sixth Circuit.

Decisions from other courts addressing monetary forfeitures under Subchapter V support the Sixth Circuit's opinion in *Maquina Musical* and conflict with the Eighth Circuit's opinion in *Laurel Avenue*. In *Pleasant Broadcasting Co. v. F.C.C.*, 564 F.2d 496 (D.C. Cir. 1977), unlicensed broadcasters challenging monetary forfeitures imposed by the FCC filed petitions with the D.C. Circuit claiming that the Appellate Court had jurisdiction based on 47 U.S.C. § 402, the same general jurisdiction statute the

Eighth Circuit claims applies in this case. The Appellate Court refused to consider the broadcasters' challenges, holding that 47 U.S.C. § 504(a) "establish[ed] the District Court as the exclusive forum for review of forfeiture orders in the first instance." *Id.* at 500. The court also ruled that the grant of jurisdiction to the District Courts "cuts off" the jurisdiction of other courts, including jurisdiction in the Appellate Courts under 47 U.S.C. § 402. *Id.*

Similarly, in *U.S. v. Evergreen Media Corp. of Chicago*, 832 F. Supp. 1183 (N.D. Ill. 1993), the Government sought enforcement of a § 503 monetary forfeiture order issued by the FCC against a radio station for violating a criminal statute prohibiting obscene radio communications. The radio station defended itself by challenging the constitutionality of the measure and the FCC's interpretation of it. Rejecting the FCC's claim of lack of jurisdiction, the court in *Evergreen* held that Section 504(a), the same section at issue in the instant matter, authorized jurisdiction in the District Court over forfeiture actions. The court stated:

> 47 U.S.C. § 504(a), which gives district courts jurisdiction to hear suits for recovery of forfeitures determined under 47 U.S.C. § 503(b), provides an exception to [28 U.S.C.] § 2342(1) for forfeiture orders. *Pleasant Broadcasting*, 564 F.2d at 501. **The court has jurisdiction to hear all defendants' counterclaim.**

Id. 1185-86 (emphasis added). *See also U.S. v. WIYN Radio, Inc.*, 464 F. Supp. 101, 105 n. 3 (N.D. Ga. 1978), *rev'd on other grounds*, 614 F.2d 495 (5th Cir. 1980) (if Congress had intended 402(a) review of forfeiture orders "it could have included them within the scope of Section 402 rather than adding the trial de novo requirement to Section 504(a)").

These cases also stand in conflict with the Eighth Circuit's decision in the instant matter.[6]

As demonstrated above, a clear and irreconcilable conflict exists between the circuits on "an important [issue] for the statutory scheme created by Congress for the regulation of broadcasting" and one in which "[n]o binding authority is a precise precedent." *Laurel Avenue*, 207 F.3d at 462, A-11. The Sixth Circuit has held that the District Court, not the Appellate Court, is the proper forum for the adjudication of constitutional defenses to a

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[6] Recently, the Ninth Circuit ruled against a micro-broadcaster in a suit brought by the Government under 47 U.S.C. § 301, which allows the government to pursue declaratory and injunctive relief as an alternative to forfeiture against those who violate the Communications Act. *See U.S v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000). In holding that the micro-broadcaster could not raise constitutional defenses to the Government's declaratory and injunctive action, the court relied, in part, on the Eighth Circuit's recent decision in *Laurel Avenue* (while also recognizing the split of authority among the circuits). *See Dunifer*, 219 F.3d at 1006-08. Importantly, however, the Ninth Circuit declared that it would not decide the separate issue of whether individuals facing forfeitures under 47 U.S.C. § 504(a), the statutory section at issue in this case, can raise constitutional defenses. *Id.* at 1007 n.6. Indeed, as the court further recognized, it earlier held in *Dougan v. F.C.C.*, 21 F.3d 1488 (9th Cir. 1994), that at least with respect to monetary forfeitures, a defendant could raise constitutional defenses in District Court. *See Dougan*, 21 F.3d at 1491 ("§ 504(a) vests exclusive jurisdiction in the district courts to hear enforcement suits brought by the government"). The unsettled legal landscape within the Ninth Circuit itself over the ability of micro-broadcasters to raise constitutional arguments when the Government files suit against them contributes to the need for this Court to resolve this important issue.

Government forfeiture action under the Communications Act. The Eighth Circuit has held precisely the opposite. Moreover, decisions from other courts addressing the intersection between Subchapters IV and V of the Communications Act contribute to the highly unsettled state of the law in this area. The need for resolution by this Court is critical.

Finally, the issue of where a micro-broadcaster can raise defenses to a Government enforcement action is an urgent one. Throughout the nation, the Government brings enforcement actions against micro-broadcasters like Fried. Their broadcasts vary from religious programming to alternative music formats, but one thing is the same: all of the broadcasters, when faced with court action, cannot be certain where to defend themselves or what defenses can be raised due to conflicting law, and, as a result, often find themselves defenseless. In Fried's case, this confusion was heightened by the FCC's choice not to pursue him administratively, or even bother to respond to his administrative request for a waiver. Rather, the Government chose to pursue him in District Court, the same place where Fried should be allowed to defend himself, as set forth below, pursuant to the specific statutory mandate of 47 U.S.C. § 504(a).

II. THE RULING BELOW CONFLICTS WITH THE STATUTORY LANGUAGE AND HISTORY OF THE COMMUNICATIONS ACT.

Fried is entitled to raise constitutional defenses to the Government's forfeiture of his equipment in District Court based on the specific mandate of 47 U.S.C. § 504(a).

Forfeitures under § 510 are enforced by § 504(a), which encompasses both monetary fines and seizures of property, such as this case. Under § 504(a), any lawsuit to recover a forfeiture is subject to "trial de novo" in District Court. Nothing in the statute's language or history restricts the defenses that can be raised in a forfeiture proceeding.

Indeed, Section 504's legislative history reinforces the clear statutory language entitling a claimant in a forfeiture action to an opportunity to present all defenses in the District Court. The legislative history indicates that:

> [I]n passing the amendments Congress was operating under the assumption that **any review** would occur through trial de novo in the district court. . . . **[T]he possibility of providing for a review on the basis of the administrative record, following a full administrative hearing by the Commission, was raised in the hearings before the Senate Committee, but was rejected in favor of the approach ultimately enacted into § 504.** . . .

Pleasant Broadcasting Co., 564 F.2d at 501 (emphasis added). As a special jurisdiction statute, § 504(a) trumps 47 U.S.C. § 402, the statute upon which the Eighth Circuit below relied. *Pleasant Broadcasting, id.* ("a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction"); see also *Edmond v. U.S.*, 520 U.S. 651 (1957) (specific statute trumps general one). Accordingly, the "statutory scheme" supports jurisdiction of this case in the District Court, not the Appellate Court. Section 504(a) is a special review statute that vests the District Court with full jurisdiction over forfeiture

actions and entitles Fried to assert all available defenses in that District Court proceeding. Barring him from defending himself there effectively guts the explicit statutory mandate that a forfeiture claimant is entitled to a full trial de novo in the Government's enforcement action.

Contrary to the Panel's characterization, Fried is not seeking to make an "end run" around § 402(a), which provides for Appellate Court review of "any order" of the FCC. That provision is inapplicable here because the FCC never issued an "order" from which Fried could appeal. The FCC sent Fried a warning letter, which triggered his prompt response and waiver request. It has now been over four years since Fried's request and the FCC has never responded to it or even acknowledged its existence. The FCC also never issued Fried a Notice of Apparent Liability, a Cease and Desist Order, or any other administrative order that it could have issued and from which he could appeal. See 47 U.S.C. §§ 312(b), 503. Without any response to his request for a waiver or some other administrative action, Fried has no "order" to appeal.

Moreover, the FCC regulatory scheme disallowing micro-broadcasting does not constitute an appealable "order" under § 402(a). Fried cannot, sua sponte, challenge the FCC's regulatory scheme under that statute, absent the FCC's initiation of some administrative action, which it has not done. Further, § 402(a) prescribes that any proceeding to challenge a FCC order not specifically identified in § 402(b) is governed by 28 U.S.C. § 2342. Under 28 U.S.C. § 2342(1), Appellate Courts have exclusive jurisdiction to set aside "final orders" of the FCC. That measure does not give the Appellate Court jurisdiction to determine the validity of "all rules, regulations, or

final orders" of the FCC, as it does with those of the Secretary of Transportation, the Federal Maritime Commission, and the Surface Transportation Board. 28 U.S.C. § 2342(3), (5). If the statute encompassed appellate review of FCC rules and regulations, it would so state and its omission from the FCC list in particular indicates congressional intent to exclude regulations from the appellate court review procedure. *See Amtrak v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (setting forth the statutory construction doctrine of *expressio unius*: when "legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.") The narrow language of "final orders," when contrasted with the broader view the same statute specifies for other agency actions, indicates that Congress did not intend it to govern review of FCC rules and regulations, which is also consistent with § 504's language and history.[7]

Because there is no "final order," or any "order" for that matter, Fried has nothing to appeal to the Court of Appeals. The sole forum available for any remedy on his part is the District Court. That forum, under § 504(a), has jurisdiction to conduct a "trial de novo" in forfeiture

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[7] The main case on which the Eighth Circuit relied, *F.C.C. v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), is entirely inapposite to the issue here. That case involved a District Court challenge initiated by a telecommunications carrier. The Plaintiff challenged a rulemaking proceeding, which are specifically assigned to the Courts of Appeal, *after* the carrier had already brought the rulemaking petition before the FCC and lost. *Id.* at 463.

proceedings, entitling him to assert all available claims and defenses there.

III. THE RULING BELOW DEPARTS FROM ESTABLISHED FEDERAL JURISDICTION AND STANDING PRINCIPLES WHEN A PARTY FACES AN ENFORCEMENT ACTION BROUGHT BY THE GOVERNMENT.

As set forth above, a careful reading of the statutes in this case indicate that District Courts have the authority to hear all available claims and defenses in forfeiture proceedings under the Communications Act. In addition, general principles of federal jurisdiction and standing indicate that jurisdiction in the District Court contemplates submission of pleadings by the complaining party and defenses by the party being sued. Jurisdiction in the District Court encompasses jurisdiction over both the causes of action *and* any defenses to them, unless, as mentioned above, Congress specifically provides another forum for the entire case.

It is vitally important to remember that Fried came before the District Court as the *defendant* in a forfeiture action brought by the Government. The leading text on federal jurisdiction puts the issue of his ability to raise defenses in proper context: "Defendants in enforcement proceedings, threatened with the imposition of state force, clearly face injury. . . . Defendants may, *of course*, assert *any* claimed violation of their own rights. . . . " Hart and Wechsler, *The Federal Courts and the Federal System* 187 (4th ed. 1996) (emphasis added). This principle, that defendants may *of course* assert *any* claimed

violation of their rights, stands so clear that the only real body of case law on the issue of defendants' ability to raise defenses concerns their standing to assert the rights of others, *see, e.g., Craig v. Boren*, 429 U.S. 190 (1976), an issue not presented in the instant matter.

The Eighth Circuit's decision below seemed to suggest that micro-broadcasters like Fried are trying to avoid the jurisdictional requirement of bringing constitutional challenges in the correct forum by waiting for enforcement and then using these constitutional issues as defenses. This understanding is incorrect. To challenge a law or regulation, individuals generally have to wait until they have been the subject of a prosecution or threatened with prosecution. Otherwise, they will not have standing. Raising constitutional defenses to civil and criminal actions by the Government is so common that citations are unnecessary.

The Government initiated this action against Fried. The Government, not Fried, chose a District Court proceeding as the place to determine his rights when it could have pursued him administratively. Fried raised his arguments as constitutional defenses, not as part of an original action against the FCC. Perversely, the court ruled that it had jurisdiction over the Government's claims but not over Fried's defenses. No doubt many parties would love to prosecute actions while simultaneously denying the other party any defenses. That is not, however, the law. General principles of federal jurisdiction and standing law clearly indicate that Fried may properly raise defenses in the context of an enforcement action.

IV. BY DEPRIVING PETITIONER OF A TIMELY FORUM TO PRESENT HIS CONSTITUTIONAL CLAIM, THE RULING BELOW INSULATES THE FCC'S ACTIONS AND REGULATIONS FROM COURT REVIEW.

If the Eighth Circuit's interpretation of the law stands, the FCC will be able to enforce unconstitutional rules and regulations with impunity. Defendants under these actions would not be able to raise unconstitutionality as a defense. Instead, according to the Eighth Circuit, their only recourse would be to request a waiver of the applicable regulation, hope the FCC responds in sooner than four years, and then go through the FCC's administrative process.

Moreover, the actions (or, more specifically, lack thereof) of the FCC in regard to Fried's waiver application highlight the constitutional insufficiency of the supposed waiver alternative proposed by the Eighth Circuit. The FCC's generic waiver procedure, 47 C.F.R. § 1.3, applies to all FCC regulations, not just to the micro-radio regulations. And as Fried's case clearly demonstrates, there is no limitation on the amount of time the FCC may consider a waiver application. Pursuant to *Freedman v. United States*, 380 U.S. 51 (1965), procedural standards must be met by application procedures of any licensing scheme that impacts First Amendment rights. One of the primary standards under *Freedman* is that a ruling on the application must take place within a "specified, brief period." *Id.* at 59. As Fried's now over-four year wait for even a reply from the FCC aptly demonstrates, the agency's supposed waiver procedure wholly fails to meet

the requirement of a "specified, brief period" for consideration of license applications.

The FCC cannot be allowed to require Fried to go through an indefinite waiver procedure before seeking to vindicate his constitutional rights in court. Any other legal rule would allow the FCC to use its general waiver procedure to insulate unconstitutional substantive rules and regulations from judicial scrutiny. For example, a blatantly unconstitutional regulation, such as forbidding the granting of licenses to members of a particular ethnic group, could be defended from scrutiny through the simple expedient of delays in the consideration of waivers filed by members of that group. Under such a provision, the FCC would have its actions insulated from judicial review through its catch-all waiver provision. Likewise, the FCC employs its waiver provision to insulate its micro-radio regulations from judicial scrutiny while simultaneously pursuing micro-broadcasters. The effect of the Eighth Circuit's ruling in this case is to let the FCC have its cake and eat it too. The decision insulates the FCC's regulations from constitutional scrutiny and protects the agency's ability to enforce even blatantly unconstitutional regulations. It cannot stand.

V. BOTH THE EIGHTH CIRCUIT'S POLICY REASONS AND THE FIRST AMENDMENT RIGHTS AT STAKE IN THIS MATTER WARRANT REVIEW BY THE DISTRICT, NOT APPELLATE, COURT.

The policy reasons the Eighth Circuit cited as supporting appellate review are unavailing. *See Laurel Avenue*, 207 F.3d at 463, A-13. The desire to ensure a review

based upon an administrative record conflicts with § 504's legislative history, which indicates that Congress rejected a "review on the basis of the administrative record." *Pleasant Broadcasting*, 564 F.2d at 501.[8] The Sixth Circuit also explicitly rejected the administrative record rationale, holding that because the agency itself instituted the action "it makes little sense to refer the very question at issue to the agency." *Maquina Musical*, 204 F.3d at 664 (*quoting C.A.B. v. Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1973)). Moreover, the desire for uniformity of decisionmaking will not be undermined by allowing Fried to proceed with trial in the District Court, as § 504 mandates. Holding that District Court proceedings are appropriate would be consistent with the majority of cases decided by the federal courts, as set forth in the first section of this petition. Finally, the goal of having agency "expertise" is not applicable here. District Courts have the appropriate expertise to examine constitutional issues.

While raising a number of unfounded policy considerations in ruling against the micro-broadcaster, the Eighth Circuit unfortunately did not recognize that vital First Amendment rights are at stake in this case and similar micro-radio cases throughout the country. Certainly, there is no absolute First Amendment right to broadcast without a license, *see NBC v. United States*, 319 U.S. 193 (1943), but First Amendment rights are at the heart of the instant case and must inform this Court's decision on the relevant legal doctrines. Because of the

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[8] In this case there is no administrative record, as the FCC has never issued an administrative order.

forfeiture authorized by the courts in this case, the broadcast service offered by Fried and desired by listeners has been silenced. He has been deprived of his First Amendment rights and listeners have been deprived of information and artistic expression.

In *F.C.C. v. League of Women Voters*, 468 U.S. 364, 378 (1984), this Court held that "broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which [the Government] exercises its regulatory power in this area." *See also Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to reserve an uninhibited marketplace of ideas. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas . . . [and] [t]hat right may not constitutionally be abridged either by Congress or the FCC"). This Court has established a "middle-tier" scrutiny test for the regulation of broadcasting. Such regulations must be "narrowly tailored to further a substantial governmental interest." *F.C.C. v. League of Women Voters*, 468 U.S. at 380. If Fried is allowed to raise his constitutional defenses, he will argue to the District Court that the FCC's regulation of micro-radio and the forfeiture action fail to meet this standard. To prevent such a defense would inflict manifest injustice upon Fried and other micro-broadcasters, allowing the FCC to suppress speech without an opportunity to test the constitutional limits of the Government's power.

CONCLUSION

The circuits have created a clear and irreconcilable split on the issue presented in this petition. The issue is of vital importance not only to micro-radio broadcasters who find their First Amendment rights abridged, but also, as the Eighth Circuit below recognized, to "the statutory scheme created by Congress for the regulation of broadcasting." *Laurel Avenue*, 207 F.3d at 462, A-11. For these reasons, Petitioner respectfully urges this Court to grant the Petition.

Respectfully submitted,

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No. 97-3972

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

207 F.3d 458; 2000 U.S. App. LEXIS 5050

October 19, 1999, Submitted
March 27, 2000, Filed

SUBSEQUENT HISTORY: Rehearing En Banc and Rehearing Denied July 5, 2000, Reported at: *2000 U.S. App. LEXIS 15698.*

PRIOR HISTORY: Appeal from the United States District Court for the District of Minnesota. CIV 96-951. Honorable Michael J. Davis.

DISPOSITION: AFFIRMED.

COUNSEL: Counsel who presented argument on behalf of the appellant was Marshall H. Tanick, Minneapolis, MN. Additional attorneys appearing on the brief were Daniel R. Kelly and Ann M. Zewiske.

Counsel who presented argument on behalf of amicus was Scott G. Bullock, Washington, D.C.

Counsel who presented argument on behalf of the appellee was Jacob M. Lewis, AUSA, Minneapolis, MN. Additional attorney appearing on the brief was Joan D. Humes.

JUDGES: Before McMILLIAN, NOONAN[1] and MORRIS SHEPPARD ARNOLD, Circuit Judges.

OPINION BY: John T. Noonan

OPINION: NOONAN, Circuit Judge.

Alan Fried appeals from a final order entered in the United States District Court[2] for the District of Minnesota granting judgment on the pleadings in favor of the United States, pursuant to Fed. R. Civ. P. 12(c), in its action for in rem forfeiture of certain radio equipment pursuant to the Communications Act of 1934, as amended, 47 U.S.C. § 510. *United States v. Any & All Radio Station Transmission Equipment*, 976 F. Supp. 1255 (D. Minn. 1997).

The government asserted that the district court had jurisdiction over the in rem forfeiture action pursuant to 28 U.S.C. §§ 1345 (United States as plaintiff), 1355 (action for forfeiture under any Act of Congress). We have appellate jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a).

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[1] The Honorable John T. Noonan, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[2] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

For reversal, Fried argues the district court erred in holding that it lacked subject matter jurisdiction to adjudicate his constitutional affirmative defenses. For the reasons discussed below, we hold that the district court has jurisdiction to adjudicate the in rem forfeiture action, but not jurisdiction to hear Fried's constitutional challenges to the microbroadcasting regulations. Accordingly we affirm the judgment of the district court.

BACKGROUND FACTS

Most of the facts are not disputed, and the following statement of facts is taken in large part from the district court's memorandum opinion and order.

This in rem forfeiture action involves the seizure of certain radio equipment owned and used by Fried to operate BEAT, an unlicensed radio station, out of his apartment in downtown Minneapolis. BEAT broadcast at a level of about 20 watts, at a frequency of 97.7 MHZ, in an area with a radius of about 6 miles from Friend's [sic] apartment. According to Fried, BEAT's broadcast signal did not interfere with any other radio stations.

Fried is a "microbroadcaster." Microbroadcasters operate low-wattage radio stations without licensing approval from the FCC. Microbroadcasters generally use 1 to 95 watts of power to broadcast their FM radio signals. (Extremely low-wattage broadcasts do not need to be licensed by the FCC. *See* 47 C.F.R. § 15.239(b) (emissions which do not exceed 250 microvolts/meter at 3 meters as measured by average detectors).) At the present time FCC regulations bar issuing licenses to microbroadcasters, that is, any radio station broadcasting below 100

watts. *See* 47 C.F.C. § 73.211(a), .511(a), .512(c) (beginning in 1978, FCC refused to issue all future licenses for broadcasting below 100-watts, except in Alaska). It can cost more than $100,000 for a broadcast license for a 100-watt station. Broadcasting without an FCC license is a violation of federal law. 47 U.S.C. § 301. The FCC estimates that there are between 300 to 1,000 unlicensed, low-wattage radio stations broadcasting diverse programs ranging from Christian sermons to rock 'n roll to call-in discussions nationwide. Microbroadcasters generally view themselves as part of a free speech movement and as community broadcasters; they typically spend their air time talking about topics such as the evils of income tax and government regulation, reading poetry, playing "alternative" music, and expressing political points of view on many subjects.

This litigation began in July 1996, when the FCC received a complaint from a FM radio station in Rochester, MN, about an unlicensed station broadcasting on 97.7 MHZ. FCC agents investigated and confirmed unauthorized radio transmissions from Fried's apartment. In August 1996 the FCC mailed a warning letter to Fried, informing him that broadcasting unauthorized radio transmissions was unlawful in violation of 47 U.S.C. § 301, ordered him to respond to the warning letter within 10 days, and demanded that he cease operations immediately. Title 47 U.S.C. § 301 provides in part that "no person shall use or operate any apparatus for the transmission of . . . signals by radio . . . except under and in accordance with [the Federal Communications Act]

and with a license in that behalf granted under the provisions of this chapter." Persons who willfully and knowingly intend to violate the licensing requirement may have their equipment or devices seized and forfeited to the United States. *Id.* § 510(a).

Fried responded to the warning letter by challenging the constitutionality of the microbroadcasting regulations and requesting a waiver of the FCC licensing requirement, but he did not cease operation of BEAT.

PROCEEDINGS IN DISTRICT COURT

The government brought this in rem forfeiture action in federal district court. The in rem forfeiture complaint asserted that the district court had jurisdiction under 28 U.S.C. §§ 1345, 1355, and 47 U.S.C. § 510. In October 1996, after hearing, the federal magistrate judge[3] issued a warrant of arrest and notice in rem commanding the United States marshal to "arrest" the radio equipment used to operate the unlicensed radio station. The government gave notice of the arrest by personal service on Fried and his attorney and by publication. The United States marshal executed the warrant and seized the radio equipment in early November 1996. Fried filed a claim of ownership of the seized radio equipment and sought restoration of the equipment. Fried also filed an answer to the complaint in which he raised several affirmative defenses challenging the constitutionality of the microbroadcasting regulations. Fried argued in general that the

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[3] The Honorable John M. Mason, United States Magistrate Judge for the District of Minnesota.

FCC regulations barring new licenses to microbroadcasters violated the First Amendment, equal protection and due process. Fried also argued that the microbroadcasting regulations violated the Communications Act, 47 U.S.C. § 303(g) (directing the FCC to encourage larger and more effective use of radio "in the public interest"), as well as Article XIX of the United Nations Declaration of Human Rights and Article XIX of the International Covenant on Civil and Political Rights. Fried did not challenge the constitutionality of the Communications Act itself. (We note that the Supreme Court upheld the constitutionality of the Communications Act in *NBC v. United States*, 319 U.S. 190, 227, 63 S. Ct. 997, 87 L. Ed. 1344 (1943).)

The government filed a motion for judgment on the pleadings in its favor pursuant to Fed. R. Civ. P. 12(c). The government argued that it was undisputed that Fried used and possessed the radio equipment to broadcast without an FCC license. Fried admitted that he intended to continue to operate the radio equipment (and did in fact continue) to broadcast even after receiving the warning letter from the FCC ordering him to cease operations immediately. The district court agreed with the government that there was no material issue of fact in dispute and that it was entitled to judgment as a matter of law – the radio equipment violated 47 U.S.C. § 301 and seizure and forfeiture of the radio equipment was authorized under 47 U.S.C. § 510(a). 976 F. Supp. at 1257.

The district court noted, however, that Fried's affirmative defenses raised constitutional and other challenges to the microbroadcasting regulations. The government argued that it was entitled to judgment on the pleadings because, pursuant to 47 U.S.C. § 402, the

court of appeals, not the district court, has exclusive jurisdiction to determine the validity of the microbroadcasting regulations. Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." Chapter 158 includes 28 U.S.C. § 2342, which provides in part that "the court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend . . . or to determine the validity of – (a) all final orders of the [FCC] made reviewable by § 402(a) of title 47." In other words, the government argued that Fried was seeking to litigate his constitutional challenges in the wrong forum – that, instead of litigating them in the district court, Fried should raise his constitutional challenges before the FCC and then, assuming the FCC rejected his constitutional arguments, seek judicial review by appealing the final order of the FCC directly to the court of appeals. *See e.g. FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 80 L. Ed. 2d 480, 104 S. Ct. 1936 (1984). The FCC has not issued a final order in the present case because Fried has never applied for a license, although he maintained (and the district court assumed so for purposes of analysis) that he had filed a request for a waiver.

Fried argued that the district court, not the court of appeals, had exclusive jurisdiction over the forfeiture action, including the merits of his constitutional challenges to the microbroadcasting regulations. Fried argued that 47 U.S.C. § 504(a) vests exclusive jurisdiction in the district courts to hear forfeiture suits by the government

and suits by private individuals seeking to avoid forfeitures, including the merits of his constitutional challenges to the microbroadcasting regulations:

> The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, . . . in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office . . . : Provided, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo. . . .

Although federal district courts have exclusive jurisdiction to hear forfeiture suits brought by the government and suits by individuals seeking to avoid enforcement of forfeiture, the court of appeals has exclusive jurisdiction to determine the validity of all final orders of the FCC. The present case involved both an effort to avoid enforcement of the forfeiture (and thus a matter for the district court) and a constitutional challenge to the microbroadcasting regulations (and thus a matter for the court of appeals). The district court decided that Fried was really challenging the constitutionality of the microbroadcasting regulations, rather than the forfeiture order itself, and thus the case was properly one within the exclusive jurisdiction of the court of appeals pursuant to 47 U.S.C. § 402. 976 F. Supp. at 1259. The district court distinguished the two cases relied upon by Fried to support exclusive jurisdiction in the district court on the ground that, unlike Fried, the claimants in those cases challenged some aspect of the forfeiture order. *Id.* at 1258-59, citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977) (*Pleasant Broadcasting*)

(contesting whether refusal to permit FCC inspection violated regulation), and *Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994) (disputing whether petitioner violated regulation by refusing to permit FCC inspection). The district court granted the government's motion for judgment on the pleadings. This appeal followed.[4]

STANDARD OF REVIEW

We review a motion for judgment on the pleadings de novo. We accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party. Judgment on the pleadings is not properly granted unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c); *e.g.*, *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 428 (8th Cir.), *cert. denied*, 510 U.S. 861, 126 L. Ed. 2d 136, 114 S. Ct. 176 (1993); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

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[4] The National Association of Broadcasters (NAB) has tendered an amicus curiae brief in support of the Federal Communications Commission (FCC). According to its brief, the NAB is a non-profit incorporated association of radio and television broadcast stations and networks representing the nation's broadcasting industry and is committed to protecting the integrity of the spectrum used for radio and television broadcasting to ensure that the public receives the highest quality service.

JURISDICTION OF THE DISTRICT COURT

The threshold issue is which court has exclusive jurisdiction -- the district court (as Fried argues) or the court of appeals (as the government argues). The parties raise essentially the same arguments on appeal as they did in the district court. For reversal, Fried argues that the district court erred in holding that the court of appeals has exclusive jurisdiction over the forfeiture action and his constitutional defenses. Fried argues that the district court has exclusive jurisdiction because the forfeiture provision, 47 U.S.C. § 504(a), specifically refers to trial de novo in the district court and that reference contemplates adjudication of all issues raised in the forfeiture action, including any and all defenses. He further argues that this specific jurisdictional provision, which particularly refers to forfeiture orders in the district courts, overrides 47 U.S.C. § 402, which is a general jurisdictional provision for judicial review in the court of appeals of final orders of the FCC.

The government argues that the courts of appeals have exclusive jurisdiction to review all final orders of the FCC, including orders deciding applications for broadcast licenses and requests for waivers. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342 (the court of appeals (other than the court of appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the FCC). The government argues that the validity of the underlying microbroadcasting regulations is not at issue in the forfeiture action and that Fried cannot "bootstrap" a constitutional challenge to the microbroadcasting regulations into the forfeiture action. The government argues

that, by attempting to bypass first administrative review by the FCC and then judicial review in the court of appeals, Fried is improperly seeking what essentially amounts to "pre-enforcement" review of the microbroadcasting regulations without an adequate administrative record. The government argues that Fried can raise his constitutional challenges to the microbroadcasting regulations by filing an application for a license with a request for a waiver. If his application for a license and request for a waiver are denied by the FCC, the government argues that Fried can then appeal to the United States Court of Appeals for the District of Columbia Circuit, pursuant to 47 U.S.C. § 402(b)(1). Alternatively, the government argues that Fried can challenge the constitutionality of the microbroadcasting regulations by filing a petition for rulemaking pursuant to 47 C.F.R. § 1.01, and, if that petition is denied, seek judicial review in a court of appeals, pursuant to 47 U.S.C. § 402(a).

This case is an important one for the statutory scheme created by Congress for the regulation of broadcasting. No binding authority is a precise precedent, with the result that the court has a certain leeway in its interpretation of the jurisdictional provisions of the Federal Communications Act. However, by close analogy with decided cases, by out-of-circuit precedent, and by the terms of the statutory scheme, the district court is without jurisdiction to entertain a challenge to FCC regulations.

The FCC has brought a forfeiture action against a broadcaster without a license. The broadcaster's only defense is that "the FCC prohibition against low power broadcasting" is contrary to the Constitution of the

United States, the statutory mandate of 47 U.S.C. § 303(g), the United Nations Declaration of Human Rights, and the International Covenant on Civil and Political Rights. The defense is exclusively focused on the validity of the regulations. The district court has no jurisdiction to decide the validity of the regulations and therefore has no jurisdiction to consider the defense.

The statute provides: "Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." 47 U.S.C. § 402(a). The cross-referenced statute states: "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of – (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. It is hard to think of clearer language confining the review of regulations to the Courts of Appeal.

The Supreme Court has authoritatively determined that the exclusive jurisdiction of the Court of Appeals over rulemaking by the FCC may not be evaded by seeking to enjoin a final order of the FCC in the district court. *ITT*, 466 U.S. at 468 (1984). A defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction. Whichever way it is done, to ask the district court to decide whether the regulations are valid violates the statutory requirements. As this court said in applying ITT: "Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense

to an enforcement action." *Southwestern Bell Telephone v. Ark. Pub. Serv.*, 738 F.2d 901, 906 (8th Cir. 1984), *vacated and remanded on other grounds*, 476 U.S. 1167 (1986). "The exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review." *Id.*

The district court is the exclusive forum for a forfeiture. *See Moser v. FCC*, 46 F.3d 970, 973 (9th Cir.), *cert. denied*, 515 U.S. 1161, 132 L. Ed. 2d 857, 115 S. Ct. 2615 (1995); *Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994); *Pleasant Broadcasting Co. v. FCC*, 184 U.S. App. D.C. 11, 564 F.2d 496 (D.C. Cir. 1977).

The statutory scheme makes sense (1) to ensure review based on an administrative record made before the agency charged with implementation of the statute; (2) to ensure uniformity of decisionmaking because of uniform factfinding made by the agency; (3) to bring to bear the agency's expertise in engineering and other technical questions. If Fried had no way of obtaining judicial review of the regulations his case might be different. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994). But he could have obtained review by applying for a license and asking for a waiver of the regulations; rejection of his request would have permitted appeal to the circuit. Rather than follow the procedures established by law, he has attempted an end run blocked by the statutory channels provided for constitutional claims.

AFFIRMED.

United States of America, Plaintiff-Appellee, v. Any and all Radio Station Transmission Equipment; Radio Frequency Power Amplifers, Radio Frequency Test Equipment, and any other equipment associated with or used in connection with the transmission at 97.7 MHZ, located at 1400 Laurel Avenue, Apartment 1109, Minneapolis, MN 55403; Defendants, Alan Fried, Claimant-Appellant, National Association of Broadcasters, Amicus on Behalf of Appellee.

No. 97-3972

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

169 F.3d 548; 1999 U.S. App. LEXIS 3032

May 14, 1998, Submitted

February 26, 1999, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the District of Minnesota. CIV 96-951. Honorable Michael J. Davis District Judge.

DISPOSITION: Judgment of district court reversed and case remanded.

COUNSEL: Counsel who presented argument on behalf of the appellant was Marshal H. Tanick of Minneapolis, Minnesota. Also appearing on the brief were Daniel R. Kelly and Ann M. Zewiske.

Counsel who presented argument on behalf of the appellee was Joan D. Humes, Assistant United States Attorney, of Minneapolis, Minnesota. Also appearing on the brief was David L. Lillehaug.

JUDGES: Before McMILLIAN, NOONAN[1] and MORRIS SHEPPARD ARNOLD, Circuit Judges; JOHN T. NOONAN, dissenting.

OPINION BY: McMILLIAN

OPINION:

McMILLIAN, Circuit Judge.

Alan Fried appeals from a final order entered in the United States District Court[2] for the District of Minnesota granting judgment on the pleadings in favor of the United States of America, pursuant to Fed.R.Civ.P. 12(c), in its action for in rem forfeiture of certain radio equipment pursuant to the Communications Act of 1934, as amended, 47 U.S.C. § 510. *United States v. Any & All Radio Station Transmission Equipment*, 976 F. Supp. 1255 (D. Minn. 1997). For reversal, Fried argues the district court erred in holding that it lacked subject matter jurisdiction to adjudicate his constitutional affirmative defenses. For the reasons discussed below, we hold that the district court has exclusive jurisdiction to adjudicate the in rem forfeiture action, including Fried's constitutional challenges to the microbroadcasting regulations. Accordingly, we reverse the judgment of the district court and remand the case to the district court for further proceedings.

The government asserted that the district court had jurisdiction over the in rem forfeiture action pursuant to

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[1] The Honorable John T. Noonan, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[2] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

28 U.S.C. §§ 1345 (United States as plaintiff), 1355 (action for forfeiture under any Act of Congress). We have appellate jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed.R.App.P. 4(a).

BACKGROUND FACTS

Most of the facts are not disputed, and the following statement of facts is taken in large part from the district court's memorandum opinion and order.

This in rem forfeiture action involves the seizure of certain radio equipment owned and used by Fried to operate BEAT, an unlicensed radio station, out of his apartment in downtown Minneapolis. BEAT broadcast at a level of about 20 watts, at a frequency of 97.7 MHZ, in an area with a radius of about 6 miles from Fried's apartment. According to Fried, BEAT's broadcast signal did not interfere with any other radio stations.

Fried is a "microbroadcaster." Microbroadcasters operate low-wattage radio stations without licensing approval from the FCC. Microbroadcasters generally use 1 to 95 watts of power to broadcast their FM radio signals. (Extremely low-wattage broadcasts do not need to be licensed by the FCC. *See* 47 C.F.R. § 15.239(b) (emissions which do not exceed 250 microvolts/meter at 3 meters as measured by average detectors).) At the present time FCC regulations bar issuing licenses to microbroadcasters, that is, any radio station broadcasting below 100 watts. *See* 47 C.F.R. § 73.211(a), .511(a), . 512(c) (beginning in 1978, FCC refused to issue all future licenses for broadcasting below 100 watts, except in Alaska). It can cost

more than $100,000 for a broadcast license for a 100-watt station. Broadcasting without an FCC license is a violation of federal law. 47 U.S.C. § 301. The FCC estimates that there are between 300 to 1,000 unlicensed, low-wattage radio stations broadcasting diverse programs ranging from Christian sermons to rock'n roll to call-in discussions nationwide. Microbroadcasters generally view themselves as part of a free speech movement and as community broadcasters; they typically spend their air time talking about topics such as the evils of income tax and government regulation, reading poetry, playing "alternative" music, and expressing political points of view on many subjects.

This litigation began in July 1996, when the FCC received a complaint from an FM radio station in Rochester, MN, about an unlicensed station broadcasting on 97.7 MHZ. FCC agents investigated and confirmed unauthorized radio transmissions from Fried's apartment. In August 1996 the FCC mailed a warning letter to Fried, informing him that broadcasting unauthorized radio transmissions was unlawful in violation of 47 U.S.C. § 301, ordered him to respond to the warning letter within 10 days, and demanded that he cease operations immediately. Title 47 U.S.C. § 301 provides in part that "no person shall use or operate any apparatus for the transmission of . . . signals by radio . . . except under and in accordance with [the Federal Communications Act] and with a license in that behalf granted under the provisions of this chapter." Persons who willfully and knowingly intend to violate the licensing requirement may have their equipment or devices seized and forfeited to the United States. *Id.* § 510(a).

Fried responded to the warning letter by challenging the constitutionality of the microbroadcasting regulations and requested a waiver of the FCC licensing requirement, but he did not cease operation of BEAT. (The government disputed whether or not Fried requested a waiver, but the district court assumed he had done so. 976 F. Supp. at 1256 n. 1.)

PROCEEDINGS IN DISTRICT COURT

The government then brought this in rem forfeiture action in federal district court. The in rem forfeiture complaint asserted the district court had jurisdiction under 28 U.S.C. §§ 1345, 1355, and 47 U.S.C. § 510. In October 1996, after a hearing, the federal magistrate judge[3] issued a warrant of arrest and notice in rem commanding the United States marshal to "arrest" the radio equipment used to operate the unlicensed radio station. The government gave notice of the arrest by personal service on Fried and his attorney and by publication. The United States marshal executed the warrant and seized the radio equipment in early November 1996. Fried filed a claim of ownership of the seized radio equipment and sought restoration of the equipment. Fried also filed an answer to the in rem forfeiture complaint in which he raised several affirmative defenses challenging the constitutionality of the microbroadcasting regulations. Fried argued in general that the FCC regulations barring new

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[3] The Honorable John M. Mason, United States Magistrate Judge for the District of Minnesota.

licenses to microbroadcasters violated the First Amendment, equal protection and due process. Fried also argued that the microbroadcasting regulations violated the Communications Act, 47 U.S.C. § 303(g) (directing the FCC to encourage larger and more effective use of radio "in the public interest"), as well as Article XIX of the United Nations Declaration of Human Rights and Article XIX of the International Covenant on Civil and Political Rights. Fried did not challenge the constitutionality of the Communications Act itself. (We note that the Supreme Court upheld the constitutionality of the Communications Act in *NBC v. United States*, 319 U.S. 190, 227, 63 S. Ct. 997, 87 L. Ed. 1344 (1943).)

The government filed a motion for judgment on the pleadings in its favor pursuant to Fed.R.Civ.P. 12(c). The government argued that it was undisputed that Fried used and possessed the radio equipment to broadcast without an FCC license. Fried admitted that he intended to continue to operate the radio equipment (and did in fact continue) to broadcast even after receiving the warning letter from the FCC ordering him to cease operations immediately. The district court agreed with the government that there was no material issue of fact in dispute and that it was entitled to judgment as a matter of law – the radio equipment violated 47 U.S.C. § 301 and seizure and forfeiture of the radio equipment was authorized under 47 U.S.C. § 510(a). 976 F. Supp. at 1257.

The district court noted, however, that Fried's affirmative defenses raised constitutional and other challenges to the microbroadcasting regulations. The government argued that it was entitled to judgment on the pleadings because, pursuant to 47 U.S.C. § 402, the

court of appeals, not the district court, has exclusive jurisdiction to determine the validity of the microbroadcasting regulations. Section 402(a) provides that "any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." Chapter 158 includes 28 U.S.C. § 2342, which provides in part that "the court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend . . . or to determine the validity of – (1) all final orders of the [FCC] made reviewable by § 402(a) of title 47." In other words, the government argued that Fried was seeking to litigate his constitutional challenges in the wrong forum – that instead of the district court, Fried should raise his constitutional challenges before the FCC and then, assuming the FCC rejects his constitutional arguments, seek judicial review by appealing the final order of the FCC directly to the court of appeals. *See*, e.g., FCC v. ITT World Communications, Inc., 466 U.S. 463, 468, 80 L.Ed.2d 480, 104 S. Ct. 1936 (1984). The FCC has not issued a final order in the present case because Fried has never applied for a license, although he maintained (and the district court assumed so for purposes of analysis) that he had filed a request for a waiver.

Fried argued that the district court, not the court of appeals, had exclusive jurisdiction over the forfeiture action, including the merits of his constitutional challenges to the microbroadcasting regulations. Fried argued that 47 U.S.C. § 504(a) vests exclusive jurisdiction in the district courts to hear forfeiture suits by the government

and suits by private individuals seeking to avoid forfeitures, including the merits of his constitutional challenges to the microbroadcasting regulations:

> The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, . . . in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office . . . : Provided, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo. . . .

Although federal district courts have exclusive jurisdiction to hear forfeiture suits brought by the government and suits by individuals seeking to avoid enforcement of forfeiture, the court of appeals has exclusive jurisdiction to determine the validity of all final orders of the FCC. The present case involved both an effort to avoid enforcement of the forfeiture (and thus a matter for the district court) and a constitutional challenge to the microbroadcasting regulations (and thus a matter for the court of appeals). The district court decided that Fried was really challenging the constitutionality of the microbroadcasting regulations, rather than the forfeiture order itself, and thus the case was properly one within the exclusive jurisdiction of the court of appeals pursuant to 47 U.S.C. § 402. 976 F. Supp. at 1259. The district court distinguished the two cases relied upon by Fried to support exclusive jurisdiction in the district court on the ground that, unlike Fried, the claimants in those cases challenged some aspect of the forfeiture orders. *Id.* at 1258-59, citing *Pleasant Broadcasting Co. v. FCC*, 184 U.S. App. D.C. 11, 564 F.2d 496 (D.C. Cir.

1977) (Pleasant Broadcasting) (contesting whether refusal to permit FCC inspection violated regulation), and *Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994) (disputing whether petitioner violated regulation by refusing to permit FCC inspection). The district court granted the government's motion for judgment on the pleadings. This appeal followed.[4]

STANDARD OF REVIEW

We review a motion for judgment on the pleadings de novo. We accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party. Judgment on the pleadings is not properly granted unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c); e.g., *National Car Rental System, Inc. v. Computer Assocs. Int'l. Inc.*, 991 F.2d 426, 428 (8th Cir.), *cert. denied*, 510 U.S. 861, 126 L. Ed. 2d 136, 114 S. Ct. 176 (1993); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

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EXCLUSIVE JURISDICTION IN DISTRICT COURT

The threshold issue is which court has exclusive jurisdiction – the district court (as Fried argues) or the court of appeals (as the government argues). The parties raise essentially the same arguments on appeal as they did in the district court. For reversal, Fried argues that the district court erred in holding that the court of appeals has exclusive jurisdiction over the in rem forfeiture action and his constitutional defenses. Fried argues that the district court has exclusive jurisdiction because the forfeiture provision, 47 U.S.C. § 504(a), specifically refers to trial de novo in the district court and that reference contemplates adjudication of all issues raised in the forfeiture action, including any and all defenses. He further argues that this specific jurisdictional provision, which particularly refers to forfeiture orders in the district courts, overrides 47 U.S.C. § 402, which is a general jurisdictional provision for judicial review in the courts of appeals of final orders of the FCC.

The government argues that the courts of appeals have exclusive jurisdiction to review all final orders of the FCC, including orders deciding applications for broadcast licenses and requests for waivers. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342 (the court of appeals (other than the court of appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the FCC). The government argues that the validity of the underlying microbroadcasting regulations is not at issue in the in rem forfeiture action and that Fried cannot

"bootstrap" a constitutional challenge to the microbroadcasting regulations into the forfeiture action. The government argues that, by attempting to bypass first administrative review by the FCC and then judicial review in the court of appeals, Fried is improperly seeking what essentially amounts to "pre-enforcement" review of the microbroadcasting regulations without an adequate administrative record. The government argues that Fried can raise his constitutional challenges to the microbroadcasting regulations by filing an application for a license with a request for a waiver. If his application for a license and request for a waiver are denied by the FCC, the government argues that Fried can then appeal to the United States Court of Appeals for the District of Columbia Circuit, pursuant to 47 U.S.C. § 402(b)(1). Alternatively, the government argues that Fried can challenge the constitutionality of the microbroadcasting regulations by filing a petition for rulemaking pursuant to 47 C.F.R. § 1.401, and, if that petition is denied, then seek judicial review in any court of appeals, pursuant to 47 U.S.C. § 402(a).

This is a difficult issue, and the cases are not easy to reconcile. Nonetheless, we think Fried's argument is persuasive. In particular, we are persuaded by the statutory analysis in *Dougan v. FCC*, 21 F.3d 1488. In that case, the FCC had issued a final forfeiture order against Dougan for operating a radio station without a license and for refusing to permit FCC engineers to inspect the station. Dougan filed a petition for review in the court of appeals, citing 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. The government contested Dougan's right to seek judicial review of the forfeiture order in the court of appeals, arguing that

the more specific forfeiture statute, 47 U.S.C. § 504(a), controlled the more general one, 47 U.S.C. § 402(a), even though 47 U.S.C. § 504(a) deals only with suits by the government to enforce forfeiture and not suits by recipients of notices of forfeiture seeking to avoid enforcement. The Ninth Circuit agreed with the government's argument, holding that the more specific 47 U.S.C. § 504(a) "is a special review statute which vests [exclusive] jurisdiction over forfeiture actions in the district court, and therefore cuts off simultaneous jurisdiction in other courts." 21 F.3d at 1491 (referring to enforcement suits by the government as well as suits by private individuals seeking to avoid enforcement), citing *Pleasant Broadcasting*, 564 F.2d at 496, 500-01.

The *Dougan* court relied on the analysis in an earlier case, *Pleasant Broadcasting*, which involved consolidated petitions by two broadcast licensees who had requested that forfeiture orders entered against them by the FCC be set aside. In the first petition, the FCC had imposed a $500 forfeiture on Pleasant Broadcasting for "repeatedly" violating the over- power regulation. The sole contention was the FCC's interpretation of the word "repeatedly" was erroneous as a matter of law. The second petition involved the FCC finding that WIYN Radio was in "repeated" violation of the Personal Attack Rule, 47 C.F.R. § 73.123, which required the licensee, within seven days, to notify the party that had been publicly and personally attacked. The FCC found that a separate offense had occurred during each of the 20 days WIYN Radio had failed to notify the attacked party. Both Pleasant Broadcasting and WIYN Radio contested the FCC's

interpretation of "repeatedly" and sought judicial review in the D.C. Circuit pursuant to 47 U.S.C. § 402(a).

The D.C. Circuit held that 47 U.S.C. § 504(a) established the district court as the exclusive forum for review of the forfeiture orders. 564 F.2d at 500 (noting that, even though that section by its terms makes no provision for initiation of judicial review by persons subjected to forfeiture order, it clearly provides such persons with opportunity to obtain full review in district court in proceeding which the government must bring to collect the monetary forfeiture). The D.C. Circuit noted that, " 'even where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute.' " *Id.* at 500-01, citing *Investment Co. Institute v. Board of Governors*, 179 U.S. App. D.C. 311, 551 F.2d 1270, 1279 (D.C. Cir. 1977). Accord *United States v. Any & All Radio Station Transmission Equipment*, 19 F. Supp. 2d 738, 746-47 (E.D. Mich. 1998) (Bent Oak) (holding 47 U.S.C. § 504(a) is a special review statute that vests jurisdiction over forfeiture actions in the district courts and cuts off simultaneous jurisdiction in other courts); cf. *United States v. Neset*, 10 F. Supp. 2d 1113, 1114-15 (D.N.D. 1998) (holding courts of appeals have exclusive jurisdiction to review FCC declaratory rulings on validity of FCC policies or practices; whether FCC policies or practices comply with paperwork reduction act or administrative procedures act are matters within primary jurisdiction of FCC). But *see Moser v. FCC*, 46 F.3d 970, 973 (9th Cir.) (holding summarily that district courts lack jurisdiction over all challenges to FCC regulations), *cert. denied*, 515 U.S. 1161, 132 L. Ed. 2d

857, 115 S. Ct. 2615 (1995); *United States v. Any & All Radio Station Transmission Equipment*, 29 F. Supp. 2d 393, 397-98 (E.D. Mich. 1998) (holding that district court does not have jurisdiction in forfeiture action to entertain challenge to constitutionality of FCC microbroadcasting regulations; claimant must first seek final decision by FCC and then appeal any unfavorable decision to appropriate court of appeals, citing district court decision in the present appeal). The D.C. Circuit considered the statutory scheme and concluded that

> it is unlikely that Congress intended for persons in the position of the licensees to have two bites at the apple, that is, to be able to challenge the forfeiture order in a court of appeals on the basis of the administrative record and, if unsuccessful, to litigate all issues de novo in the district court, with a right of appeal to the court of appeals. . . . We would be reluctant to give litigants a choice of forums for review, without some support in the language or history of the forfeiture statute, or some showing that the special procedure enacted by Congress is unavailable or inadequate.

564 F.2d at 501 (noting that review of legislative history indicated that Congress was operating under assumption that any review would occur through trial de novo in the district court).

Another decision involving an unlicensed microbroadcaster also supports the position that the district courts have exclusive jurisdiction over forfeiture actions, including any constitutional affirmative defenses raised by the person seeking to avoid enforcement. In *United States v. Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998), the

government brought an action for injunctive and declaratory relief in federal district court against Stephen Paul Dunifer, the owner and operator of an unlicensed microbroadcasting radio station, Radio Free Berkeley. The government sought a ruling that Dunifer was violating 47 U.S.C. § 301 by broadcasting without a license. Dunifer did not dispute that he had been operating the radio station without a license, but he argued that he should not be enjoined from broadcasting because the FCC's refusal to license microbroadcasters amounted to a content-based restriction on speech in violation of the First Amendment. The FCC had issued a monetary forfeiture order and Dunifer had filed an application for review of the forfeiture order, raising the same constitutional arguments. The district court denied the government's motion for a preliminary injunction and stayed the case under the doctrine of primary jurisdiction so that the issue of the constitutionality of the microbroadcasting regulations could be decided first by the FCC, either in the context of the pending forfeiture proceeding or in FCC rule-making proceedings. 997 F. Supp. at 1238.

After the FCC issued its forfeiture order holding the microbroadcasting regulations did not violate the First Amendment (or the FCC's statutory mandate to regulate in the public interest), the government filed a motion for summary judgment in the declaratory judgment action, arguing that the district court lacked jurisdiction because exclusive jurisdiction over any challenge to FCC regulations is vested in the court of appeals. The district court rejected that argument, ruling that 47 U.S.C. § 401(a), which provides the district court with jurisdiction over actions by the government in which it alleges failure to

comply with the Communications Act, including the charge of broadcasting without a license, granted jurisdiction to the district court over any valid defense to the charge. 997 F. Supp. at 1238.

We find the analysis in these cases to be persuasive and hold that the district court has exclusive jurisdiction over the in rem forfeiture action, including Fried's constitutional affirmative defenses.

ISSUES ON REMAND

For purposes of this appeal, we have assumed, as did the district court, that Fried filed a request for a waiver of the microbroadcasting rules in which he raised his arguments challenging their constitutionality. The FCC does have jurisdiction to determine the constitutionality of its regulations. *See id.* at 1240, citing *Meredith Corp. v. FCC*, 258 U.S. App. D.C. 22, 809 F.2d 863, 872, 874 (D.C. Cir. 1987) (holding that FCC was required to respond to plaintiff's constitutional arguments and remanding case to FCC to consider constitutionality of FCC fairness doctrine on its face and as applied), and *WAIT Radio v. FCC*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1156 (D.C. Cir. 1969) (remanding FCC's denial of applicant's waiver request to FCC to reconsider First Amendment issue raised therein). *See* also *United States v. Evergreen Media Corp.*, 832 F. Supp. 1183, 1185-86 (N.D. Ill. 1993) (district court held it had jurisdiction to hear defendant's counterclaims challenging facial constitutionality of FCC regulation barring obscene, indecent or profane language). However, the record does not indicate that the FCC has acted upon Fried's request for waiver.

Having determined that the district court has exclusive jurisdiction to adjudicate the in rem forfeiture action, we reverse the judgment of the district court and remand the case to the district court with directions to consider whether to invoke the doctrine of primary jurisdiction, because the issue of the constitutionality of the microbroadcasting regulations has yet to be addressed by the FCC, at least in the context of the present litigation. (As noted above, the FCC in the Dunifer forfeiture proceeding held the microbroadcasting regulations did not violate the First Amendment.) *See Bent Oak*, 19 F. Supp. 2d at 744-48 (applying doctrine of primary jurisdiction and dismissing case without prejudice because no administrative proceeding currently pending); *United States v. Dunifer*, 997 F. Supp. at 1238 (noting earlier stay of litigation under doctrine of primary jurisdiction in light of then-pending FCC forfeiture proceeding); cf. *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1260 (7th Cir. 1978) (holding exhaustion of administrative remedies doctrine retains its validity even when the collateral judicial action challenges the constitutionality of the basic statute under which agency functions); *see* also *Turro v. FCC*, 859 F.2d 1498 (D.C. Cir. 1988) (court of appeals review of FCC order denying request for waiver of FCC rules); *WAIT Radio v. FCC*, 135 U.S. App. D.C. 317, 418 F.2d 1153 (same; remanding matter to FCC for statement of reasons for denial of waiver).

We hold that the district court has exclusive jurisdiction to adjudicate the in rem forfeiture action, including Fried's constitutional affirmative defenses. Accordingly, we reverse the judgment of the district court and remand the case to the district court for further proceedings. On

remand, the district court should consider the issue of primary jurisdiction.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

I would reverse the order of the district court, but for reasons different from those elaborated in Judge McMillian's opinion. I do not believe that the defendant in this case is seeking to "enjoin, set aside, annul, or suspend any order of the Commission," *see* 47 U.S.C. § 402(a), for the simple reason that no FCC order is being challenged. This is a suit initiated by the United States to forfeit Mr. Fried's property, a suit over which the district court plainly has jurisdiction under 28 U.S.C. § 1345, § 1355. Until today I had not supposed that anyone could plausibly maintain that any court of the United States, properly seized of jurisdiction of a suit, did not also have jurisdiction to consider constitutional defenses to that suit. Congress could, of course, provide otherwise, as, for instance, by providing streamlined forfeiture remedies that excluded certain defenses, while giving a defendant an opportunity to raise those defenses in some other context. I do not see that Congress has done so in this instance.

Congress knows how to give exclusive jurisdiction to determine the validity of a regulation when it wants to. Indeed, 28 U.S.C. § 2342 is itself directly instructive on this point. While it gives the courts of appeals exclusive jurisdiction to set aside "all final orders" of the FCC, (§ 2342(1)), it gives the courts of appeals the same jurisdiction to set aside "all rules, regulations, or final orders" of a certain kind issued by the Secretary of Transportation (28 U.S.C. § 2342(3)(A)) and the Federal Maritime

Commission (28 U.S.C. § 2342(3)(B)). *See* also 28 U.S.C. § 2342(5) (all rules, regulations, or final orders of a certain kind issued by the ICC). It thus becomes plain that 28 U.S.C. § 2342(1) does not give the courts of appeals exclusive jurisdiction to determine the validity of an FCC regulation.

FCC v. ITT World Communications, Inc., 466 U.S. 463, 80 L. Ed. 2d 480, 104 S. Ct. 1936 (1989), on which Judge Noonan relies, is not to the contrary, for that was a suit to enjoin a denial of a rulemaking petition. No such petition is at issue here, and the fact that Mr. Fried could file one and have his defenses adjudicated is of no moment. What we have is the case before us, and in it I see no statutory or other impediment to the consideration of Mr. Fried's defenses.

I therefore join in the order reversing and remanding the case to the district court for further proceedings.

DISSENT BY: JOHN T. NOONAN

DISSENT:

NOONAN, Circuit Judge, dissenting.

This case is an important one for the statutory scheme created by Congress for the regulation of broadcasting. No binding authority is a precise precedent, with the result that the court has a certain leeway in its interpretation of the jurisdictional provisions of the Federal Communications Act. However, by close analogy with decided cases, by out-of-circuit precedent, and by the terms of the statutory scheme, the district court is without jurisdiction to entertain a challenge to FCC regulations.

The FCC has brought a forfeiture action against a broadcaster without a license. The broadcaster's only defense is the [sic] "the FCC prohibition against low power broadcasting" is contrary to the Constitution of the United States, the statutory mandate of 47 U.S.C. § 303(g), the United Nations Declaration of Human Rights, and the International Covenant on Civil and Political Rights. The defense is exclusively focused on the validity of the regulations. The district court has no jurisdiction to decide the validity of the regulations and therefore has no jurisdiction to consider the defense.

The statute provides: "Any proceeding to enjoin set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." 47 U.S.C. § 402(a). The cross referenced statute states: "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of – (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. It is hard to think of clearer language confining the review of regulations to the Courts of Appeal.

The Supreme Court has authoritatively determined that the exclusive jurisdiction of the Court of Appeals over rulemaking by the FCC may not be evaded by seeking to enjoin a final order of the FCC in the district court. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 80 L. Ed. 2d 480, 104 S. Ct. 1936 (1984). A defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction. Whichever

way it is done, to ask the district court to decide whether the regulations are valid violates the statutory requirements. As this court said in applying ITT: "Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action." *Southwestern Bell Telephone v. Ark. Pub. Serv.*, 738 F.2d 901, 906 (8th Cir. 1984), vacated and remanded on other grounds, 476 U.S. 1167 (1986). "The exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review." *Id.*

The two cases relied on by the majority are not to the contrary. These cases, won by the FCC, merely hold that the district court is the exclusive forum for a forfeiture. The cases say nothing as to where the regulations of the FCC may be challenged. *See Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994); *Pleasant Broadcasting Co. v. FCC*, 184 U.S. App. D.C. 11, 564 F.2d 496 (D.C. Cir. 1977). As the court notes, its interpretation of the Ninth Circuit case of *Dougan* is directly contrary to *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir.), *cert. denied*, 515 U.S. 1161, 132 L. Ed. 2d 857, 1115 S. Ct. 2615 (1995).

The statutory scheme makes sense (1) to ensure review based on an administrative record made before the agency charged with implementation of the statute; (2) to ensure uniformity of decisionmaking because of uniform factfinding made by the agency; (3) to bring to bear the agency's expertise in engineering and other technical questions. If Fried had no way of obtaining judicial review of the regulations his case might be different. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994). But he could have

obtained review by applying for a license and asking for a waiver of the regulations; rejection of his request would be permitted appeal to the circuit. Rather than follow the procedures established by law, he has attempted an end run.

I would affirm the district court.

United States of America, Plaintiff, v. Any and all radio station transmission equipment, radio frequency power amplifiers, radio frequency test equipment associated with or used in connection with the transmission at 97.7 MHZ, located at 1400 Laurel Avenue, Apartment 1109, Minneapolis, MN 55403, Defendant.

Civil No. 3-96-951 (MJD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

976 F. Supp. 1255; 1997 U.S. Dist. LEXIS 14617

September 5, 1997, Decided

DISPOSITION: Plaintiff's motion for judgment on pleadings GRANTED,

COUNSEL: For United States of America, Plaintiff; Joan Humes, United States Attorney's Office, Minneapolis, MN.

For Alan Fried, Claimant: Marshall H. Tanick, Daniel R. Kelly, Ann M. Zewiske, Mansfield & Tannick, P.A., Minneapolis, MN.

JUDGES: Michael J. Davis, United States District Court Judge.

OPINION BY: Michael J. Davis

OPINION: **MEMORANDUM OPINION AND ORDER**

This matter came on for hearing before the Honorable Michael J. Davis on June 27, 1997, on a motion by the

Plaintiff, the United States of America ("Government") on behalf of the Federal Communications Commission ("FCC"), for judgment on the pleadings or in the alternative, motion to strike claimant's defenses. For the following reasons, the Court grants the Government's motion for judgment on the pleadings.

BACKGROUND

This case involves the seizure of radio equipment used in the operation of an unlicensed radio station pursuant to an *in rem* action. Claimant Alan Fried is the owner and operator of a micro-radio broadcasting station known as the "BEAT," which broadcasts at a frequency of 97.7 MHZ in an approximately twelve-mile area in and around downtown Minneapolis, Minnesota.

In August 1996, the FCC mailed a certified warning letter informing Claimant that unauthorized radio transmissions from his Minneapolis apartment violated 47 U.S.C. § 301 of the Communications Act of 1934, as amended. The FCC ordered Claimant to respond within ten days and to cease operation immediately. The claimant replied, through his attorney, by challenging the constitutionality of the FCC's regulations and he allegedly requested a waiver of the FCC's licensing requirement.[1] Claimant did not cease operation of the unlicensed radio station pending the status of the requested waiver.

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[1] Although the Government disputes whether or not Claimant requested a waiver, the Court will construe that fact in Claimant's favor for the purposes of this motion.

After a hearing, Magistrate Judge John M. Mason issued a Warrant of Arrest and Notice *In Rem* in October 1996 commanding the Marshal to arrest the radio equipment used to operate the unlicensed radio station. The Government subsequently gave notice of the arrest, by personal service on Claimant and his attorney, and by publication. In early November 1996, the United States Marshal for the District of Minnesota executed the warrant and seized the radio equipment.

Claimant subsequently filed a Claim and Verification claiming the property which had been arrested by the U.S. Marshal. Claimant also served and filed an Answer to the Complaint for Forfeiture *In Rem* in which he raises several defenses challenging the constitutionality of the FCC prohibition against low power broadcasting based on the First Amendment, the Equal Protection Clause, and the Due Process Clause. Claimant further alleged as defenses that such prohibition by the FCC violates 47 U.S.C. § 303(g), Article XIX of the U.N. Declaration of Human Rights, and Article XIX of the International Covenant on Civil and Political Rights.

The Government subsequently brought this motion seeking judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). Alternatively, the Government moves to strike Claimant's defenses pursuant to Fed.R.Civ.P. 12(f).

DISCUSSION

Under Rule 12(c), a motion for judgment on the pleadings is not properly granted unless the moving party has clearly established that no material issue of fact

remains to be resolved and the party is entitled to judgment as a matter of law. *Natl. Car Rental System, Inc. v. Computer Associates Intl. Inc.*, 991 F.2d 426, 428 (8th Cir. 1993). However, a complaint should not be dismissed on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 2 L.Ed.2d 80, 78 S. Ct. 99 (1957). In determining whether any material issues of fact remain, the court must accept all facts pled by the non-moving party as true and all reasonable inferences must be construed in favor of the non-moving party. *Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir. 1990).

First, the Government argues that no material issues of fact remain and that judgment on the pleadings is warranted. The complaint for forfeiture *in rem* alleges that defendant equipment constitutes a violation of 47 U.S.C. § 301. Section 301 provides, in part, "[n]o person shall use or operate any apparatus for the transmission of . . . signals by radio . . . except under and in accordance with [the FCA] and with a license in that behalf granted under the provisions of this chapter." The complaint further alleges that defendant equipment is subject to forfeiture pursuant to 47 U.S.C. § 510(a). That provision provides that persons who willfully and knowingly intend to violate the licensing requirement may have their equipment or devices seized and forfeited to the United States. 47 U.S.C. § 510(a).

In his answer to the complaint, Claimant admits that the defendant equipment was used and possessed for radio transmission and that the defendant equipment was

operated by Claimant on a frequency of 97.7 MHZ without a license issued by the FCC. (Answer ¶ 5-7). Claimant further admits that he continued to operate the defendant equipment to broadcast radio transmissions after receiving a warning letter from the FCC that ordered him to cease operating radio transmissions immediately. (Answer ¶ 8).

Because Claimant admits that he used the radio equipment to broadcast without an FCC license, there is no material issue remaining in regards to a violation of 47 U.S.C. § 301.[2] Moreover, seizure of the radio equipment was appropriate under section 510(a) because Claimant's willful and knowing intent is established by his continued operation of the broadcast equipment after receiving a warning letter from the FCC. *United States v. Gris*, 247 F.2d 860, 864 (2d. Cir. 1957) (willful and knowing intent to broadcast without a license may be established whether or not claimant knew that broadcasting without a license was unlawful).

Although Claimant does not dispute whether he violated the licensing requirement of 47 U.S.C. § 301, his affirmative defenses raise constitutional and other challenges to the FCC's regulatory provisions on micro-

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[2] Under some circumstances, waivers to the licensing requirement may be granted by the FCC upon a proper showing by the applicant, who would not otherwise meet the requirements for licensing, that permission to broadcast would further the public's interest. 47 C.F.R. § 73.3566(a). Although the parties dispute whether Claimant properly applied for such a waiver, that disputed fact is not material to the question of whether Claimant violated section 301 because he does not contend that any such waiver was ever granted.

broadcasting. The Government further argues that it is entitled to judgment on the pleadings because it claims that this Court is without subject matter jurisdiction to consider Claimant's defenses. The Government contends that exclusive jurisdiction to determine the validity of FCC regulations is vested in the United States Court of Appeals pursuant to 47 U.S.C. §§ 402(a)-(b). Section 402, the general rule for review of FCC actions, provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." Chapter 158 is comprised of §§ 2341-2353, and includes the following provision: "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend . . . or to determine the validity of – (1) all final orders of the [FCC] made reviewable by § 402(a) of title 47. . . . " 28 U.S.C. § 2342.

Claimant, on the other hand, argues that pursuant to 28 U.S.C. § 504(a), the Court should not dismiss the case without hearing the merits of his constitutional challenges. Section 504(a) vests exclusive jurisdiction in the district courts to hear enforcement suits by the government, and suits by private individuals seeking to avoid enforcements:

> The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, . . . , in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office . . . : Provided, That any suit for the recovery of a forfeiture imposed

> pursuant to the provisions of this chapter shall be a trial de novo. . . .

47 U.S.C. § 504(a).

Reading these various provisions together, it seems clear that federal district courts have exclusive jurisdiction to hear forfeiture suits brought by the government and suits by individuals seeking to avoid enforcement of forfeiture. On the other hand, 47 U.S.C. §§ 402(a)-(b) provides that the Court of Appeals has exclusive jurisdiction to determine the validity of all final orders of the FCC. This case presents a situation which involves both an effort to avoid enforcement of the forfeiture and a challenge to FCC regulations. Thus, the question raised by this case is where jurisdiction should lie when the relevant statutory provisions seem to mandate exclusive jurisdiction in two different jurisdictions.

To support Claimant's position, Claimant cites to *Pleasant Broadcasting Co. v. FCC*, 184 U.S. App. D.C. 11, 564 F.2d 496 (D.C.Cir. 1977) where the D.C. Court of Appeals held that § 504(a) supersedes the general rule in § 402(a). However, *Pleasant Broadcasting* involved consolidated petitions by two broadcast licensees who requested that the forfeiture orders entered against them by the Commission be set aside. In the first of the two consolidated cases, the Commission imposed a $500 forfeiture on *Pleasant Broadcasting* for "repeatedly" violating the overpower regulation. In response, Pleasant conceded to a single, and not a "repeated" violation within the meaning of 47 U.S.C. § 503(d)(1)(B). The petitioner's sole contention was that the Commission's interpretation of the word "repeatedly" was erroneous as a matter of law.

The second of the consolidated cases in *Pleasant Broadcasting* involved WIYN Radio Incorporated, a station found by the Commission to be in "repeated" violation of its Personal Attack Rule, 47 C.F.R. § 73.123. That Rule requires the licensee, within seven days, to notify the party that had been publicly and personally attacked. The Commission found that a separate offense occurred during each of the 20 days WIYN failed to notify the attacked party. WIYN contested the Commission's interpretation of "repeated."

Because *Pleasant Broadcasting* involved petitions that contested the validity of the Commissioner's finding of a violation 47 U.S.C. § 301, the court properly concluded that jurisdiction was conferred on the district court pursuant to 47 U.S.C. § 504(a). However, in this case, Claimant does not dispute whether he violated 47 U.S.C. § 301 and instead he raises constitutional challenges to the FCC's regulatory scheme as affirmative defenses.

Claimant also cites to *Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994) to support his position that section 504(a) governs the issue of jurisdiction in this case. In that case, the court held that section 504(a) grants exclusive jurisdiction to the district courts over all FCC forfeiture cases, regardless of the moving party. *Id.* at 1490. Moreover, the *Dougan* Court held that while a notice of forfeiture is clearly a final agency order reviewable under § 402(a), Section 504(a) trumps the general rule in § 402(a).

Although in *Dougan* it was undisputed that the petitioner had violated section 301, the dispute in that case was whether the petitioner violated 47 C.F.R. § 15.29 by refusing to permit FCC engineers to inspect the radio

station. The FCC found that petitioner violated 47 C.F.R. § 15.29 and set the amount of forfeiture at $17,500. The petitioner argued that because he did not violate section 15.29, the amount of forfeiture determined by the FCC was improper.[3]

Both *Pleasant Broadcasting* and *Dougan* represent circumstances in which the claimant challenged some aspect of the FCC's order of forfeiture. Because section 504 "vests exclusive jurisdiction in the district courts to review, in the first instance, licensee challenges to forfeiture orders," jurisdiction was properly conferred on the district court in those cases. *Pleasant Broadcasting*, 564 F.2d at 497.

In this case, Claimant does not specifically challenge the forfeiture order of the FCC. Rather, Claimant challenges more broadly the FCC's prohibition against low power broadcasting. Thus, the Court concludes that jurisdiction is properly conferred on the Court of Appeals pursuant to 47 U.S.C. § 402(a)-(b). Exclusive jurisdiction by the Court of Appeals on matters such as those raised by Claimant will ensure consistent application of agency regulations.

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[3] In *Dougan*, the FCC argued that jurisdiction properly conferred in the federal district court rather than the Court of Appeals. Claimant in this case argues that the FCC's position in *Dougan* directly contradicts the FCC's position here that jurisdiction is properly conferred in the Court of Appeals rather than this Court. However, because *Dougan* involved a claim for recovery of a forfeiture, the Court concludes that the FCC's position in *Dougan* does not contradict their position taken here.

ORDER

Accordingly, based upon the foregoing and all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

Plaintiff's motion for judgment on the pleadings is GRANTED.

Dated: 9-5-97
Michael J. Davis
United States District
Court Judge

United States of America, Appellee,
vs. Alan Fried, Appellant.

No. 97-3972MNST

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

200 U.S. App. LEXIS 15698

July 5, 2000

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Original Opinion of March 27, 2000, Reported at: 2000 U.S. App. Lexis 5050.

OPINION: Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Chief Judge Wollman, Judge Richard S. Arnold, Judge Loken and Judge Hansen would grant the petition. The petition for rehearing by the panel is also denied.

July 5, 2000

98-2129 United States of America, Plaintiff-Appellant, v. Any And All Radio Station Transmission Equipment, Radio Frequency Power Amplifiers, Radio Frequency Test Equipment And Any Other Equipment Associated With Or Used In Connection With The Transmission At 97.7 MHZ, Located At 2903 Bent Oak Highway, Adrian, Michigan, Defendant-Appellee, Rick Strawcutter, Claimant-Appellee. 98-2396 United States of America, Plaintiff-Appellee, v. Any And All Radio Station Transmission Equipment, Radio Frequency Power Amplifiers, Radio Frequency Test Equipment And Any Other Equipment Associated With Or Used In Connection With The Radio Transmissions On Frequency 95.9 MHZ, Located At 3968 West Vernor Highway, Detroit, Michigan 48216, Defendant-Appellant, Maquina Musical, Incorporated, Claimant-Appellant, Juan V. Marinez, Catalina Martinez, Ignacio Campos, Jorge Canchola, Sergio Vallejo, Intervenors-Counterplaintiffs-Appellants.

Nos. 98-2129/98-2396

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

204 F.3d 658; 2000 U.S. App. LEXIS 2774; 2000 FED App. 0069P (6th Cir.); 19 Comm. Reg. (P & F) 819

December 10, 1999, Argued
February 25, 2000, Decided
February 25, 2000, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Michigan at Detroit. Nos. 97-73527; 98-74368. Julian A. Cook, Jr. and Patrick J. Duggan, District Judges.

DISPOSITION: REVERSED judgment of the district court in No. 98-2129 (Strawcutter), which dismissed the government's forfeiture case sua sponte pursuant to the

doctrine of primary jurisdiction, and REMANDED case for further proceedings. REMANDED No. 98-2396 (Maquina Musical) to the district court for reconsideration in light of its determination that the doctrine of primary jurisdiction precluded it from considering Maquina Musical's "constitutional defenses" to the government's forfeiture action. Concerning Maquina Musical's appeal from the district court's denial of its motion to dismiss the government's forfeiture complaint, DISMISSED appeal for lack of jurisdiction.

COUNSEL: ARGUED: Jacob M. Lewis, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for United States of America.

Patrick M. Edwards, CONSTITUTIONAL LITIGATION ASSOCIATION, Detroit, Michigan, for Claimants.

ON BRIEF: Jacob M. Lewis, Robert S. Greenspan, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for United States of America.

Kevin S. Ernst, Detroit, Michigan, Katharine M. Omansiek, Detroit, Michigan, for Appellants.

Patrick M. Edwards, CONSTITUTIONAL LITIGAITON ASSOCIATION, Detroit, Michigan, for Claimants.

JUDGES: Before: JONES, COLE, and GILMAN, Circuit Judges.

OPINION BY: RONALD LEE GILMAN

OPINION:

RONALD LEE GILMAN, Circuit Judge. The principal question presented by these consolidated appeals is

whether, under the doctrine of primary jurisdiction, district courts may decline to adjudicate in rem forfeiture actions brought by the United States against persons who operate radio stations without licenses. For the reasons set forth below, we conclude that the answer is no. We therefore **REVERSE** the judgment of the district court in No. 98-2129 (Strawcutter), which dismissed the government's forfeiture case sua sponte pursuant to the doctrine of primary jurisdiction, and **REMAND** the case for further proceedings. We also **REMAND** No. 98-2396 (Maquina Musical) to the district court for reconsideration in light of its determination that the doctrine of primary jurisdiction precluded it from considering Maquina Musical's "constitutional defenses" to the government's forfeiture action. Concerning Maquina Musical's appeal from the district court's denial of its motion to dismiss the government's forfeiture complaint, we **DISMISS** the appeal as premature.

I. BACKGROUND

A. No. 98-2129 (Strawcutter)

On November 12, 1996, the manager of a licensed FM radio station in Toledo, Ohio telephoned the Federal Communications Commission (FCC) and complained that the signal from a radio station identifying itself as "Radio Free Lenawee" was interfering with his station's signal. During the preceding two weeks, a number of other persons had also complained to the FCC's Detroit office about Radio Free Lenawee's transmissions.

On November 14, 1996, the FCC sent a field agent to investigate the complaints. An unlicensed radio station

identifying itself as Radio Free Lenawee was found to be broadcasting from a building at 2903 Bent Oak Highway, in Adrian, Michigan, at a frequency of 97.7 megahertz. The FCC later determined that Radio Free Lenawee was broadcasting at a strength of 29,625 microvolts per meter at a distance of over half a mile, far exceeding that permitted for unlicensed radio stations (a maximum of 250 microvolts per meter at a distance of three meters). *See* 47 C.F.R. § 15.239(b).

Rick Strawcutter, Radio Free Lenawee's owner and operator, took the position that he had a constitutional right to continue his radio broadcasts without interference from the government. FCC inspectors sought to inspect Radio Free Lenawee's premises. Strawcutter refused them permission to do so. The FCC notified Strawcutter by letter that he was violating the Communications Act of 1934, 47 U.S.C. §§ 151-614. Specifically, the letter stated that (1) the station's broadcast strength exceeded the maximum allowed by 47 C.F.R. § 15.239(b), (2) the station was violating 47 U.S.C. § 301 because it was operating an unlicensed transmitter, and (3) operating a transmitter without a license subjects the operator to the criminal penalties described in 47 U.S.C. § 501. Strawcutter responded with a letter in which he explained that he had "come to a sincerely held conclusion that the [FCC] in reality has no Constitutional regulatory power over FM stations which run a power level less than 100 watts."

Between the end of November of 1996 and the end of February of 1997, the FCC conducted six field tests. Those tests established that Radio Free Lenawee, which was still

unlicensed, was continuing to transmit, and was doing so in excess of the permissible signal strength.

On July 22, 1997, the government filed in the United States District Court for the Eastern District of Michigan a complaint in which it sought, pursuant to 47 U.S.C. § 510(a), the civil in rem forfeiture of the radio transmission equipment located at 2903 Bent Oak Highway, the source of Radio Free Lenawee's broadcasts. Strawcutter filed a claim of ownership on August 5, 1997, and an answer approximately two weeks later. In his answer, Strawcutter asserted that the FCC regulation that prohibits unlicensed "microbroadcasting" was invalid because it violated his rights under the First Amendment, the Equal Protection and Due Process Clauses of the Fifth Amendment, Article XIX of the United Nations Declaration of Human Rights, and Article XIX of the International Covenant on Civil and Political Rights. He also argued that the FCC regulation is inconsistent with its statutory mandate to "encourage the larger and more effective use of radio in the public interest," as set forth in 47 U.S.C. § 303(g).

Strawcutter's arguments centered around the FCC regulations found at 47 C.F.R. Part 73. Those regulations classify FM radio broadcast licenses as Class A, Class B, Class C, or Class D, depending on the station's transmission power, antenna height, and the area or place from which the broadcasts emanate. *See* 47 C.F.R. §§ 73.210-.211. The FCC once granted Class D licenses to "microbroadcasters," but in 1978 adopted a regulation effectively preventing new Class D stations from operating, except in Alaska. *See* 47 C.F.R. § 73.512(c) (providing that no new Class D applications would be accepted,

except in Alaska or by existing Class D stations seeking to change frequency).

We note that during the pendency of this appeal, the FCC has changed its position on microbroadcasting. *See In the Matter of Creation of a Low Power Radio Service*, FCC 99-6, 14 FCC Rcd 2471, at ¶ 1 (released Feb. 3, 1999) (proposing the creation of two new classes of low-power FM radio stations, and seeking comment "on whether to establish a third, 'microradio' class of low power radio service that would operate in the range of 1 to 10 watts."); *In the Matter of Creation of Low Power Radio Service*, 15 FCC Rcd 2205, 2000 FCC LEXIS 395, FCC 00-19, 2000 WL 85304, at ¶ 1 (released January 27, 2000) (authorizing, among other things, the licensing of low-power FM stations operating at a maximum of 10 watts). Notwithstanding this change in policy, however, Strawcutter apparently will still not be eligible for a broadcasting license. *See In the Matter of Creation of Low Power Radio Service*, 2000 WL 85304, at ¶¶ 51-55 (announcing that microbroadcasters who had broadcast without licenses in the past will now be eligible for low-power broadcast licenses, but only if they voluntarily ceased broadcasting no later than February 26, 1999 "without specific direction to terminate by the FCC," or ceased broadcasting within 24 hours after being advised to do so by the FCC).

On June 9, 1998, the government moved for summary judgment, taking the position that it was entitled to summary judgment as a matter of law because there was no material issue of fact – indeed, the facts were essentially uncontroverted – as to whether Strawcutter had broadcast without a license despite being warned by the FCC that it was unlawful for him to do so. The only disputed

issues were the validity of the regulations that Strawcutter concededly violated, and whether the authorizing statutes were unconstitutional or in conflict with a treaty. Those issues, the government argued, were part of a "regulatory challenge" that was "not justiciable" in the district court, because "Congress vested exclusive jurisdiction in the United States Courts of Appeals, whether that review involves FCC regulations generally or specific licensing decisions."

The government claimed that in challenging the legal basis of the statutes or regulations with which he disagreed, Strawcutter's sole options were to apply to the FCC for a broadcast license or to petition the FCC either to amend its regulations or to waive their application to him. Strawcutter argued that those administrative remedies offered him no realistic prospect of relief, because the FCC had an unyielding policy not to waive the regulations that bar microbroadcasters from transmitting. As many other microbroadcasters around the country have done, Strawcutter argued that the FCC was "being used as the tool of powerful broadcast corporations" that wished to maintain cartel-like control over the airwaves, at the cost of suppressing potential competitors and depriving the listening public of "low-cost broadcasting on community issues as an alternative to mainstream perspectives."

The district court, in a memorandum and order dated August 7, 1998, denied the government's motion and, invoking sua sponte the doctrine of primary jurisdiction, dismissed the action for lack of subject matter jurisdiction. *See United States v. Any and All Radio Station Equipment (Strawcutter)*, 19 F. Supp. 2d 738 (E.D. Mich. 1998).

B. No. 98-2396 (Maquina Musical)

On April 16, 1998, the FCC's Detroit office received a complaint about an unlicensed FM radio station broadcasting at a frequency of 95.9 megahertz. That day, FCC agents went to 3968 West Vernor Highway in Detroit, and detected the emission of FM broadcast signals at 95.9 megahertz that were 146 times the maximum strength permitted by FCC regulations for unlicensed broadcasts. On April 21, 1998, the agents returned and detected FM broadcast signals that were nearly 8,900 times the maximum permitted for unlicensed broadcasts. The agents entered the premises of the station, which was called Radio Maquina, and spoke with Pedro Zamora, the president of Maquina Musical, which owns Radio Maquina. They told Zamora that Radio Maquina's broadcasts exceeded the maximum strength permitted by FCC regulations and that the broadcasts violated 47 U.S.C. § 301. It is undisputed that Maquina Musical did not have a broadcast license, and that it had never applied for one.

On May 4, 1998, the agents determined that Radio Maquina was continuing to broadcast. That day, the agents determined that the broadcast signals were more than 7,600 times the maximum permissible strength. The FCC's Detroit office sent Zamora a letter on May 12, 1998, again informing him that the broadcasts violated 47 U.S.C. § 301 and demanding that he cease broadcasting forthwith, or face numerous potential penalties, including criminal prosecution and civil forfeiture of his broadcasting equipment. Zamora replied to the FCC's letter by demanding an administrative hearing before any forfeiture proceedings against him were instituted. During August of 1998, the FCC determined that Radio Maquina

was still broadcasting, and was continuing to do so well in excess of the maximum strength permitted by FCC regulations.

On October 7, 1998, the government filed a civil complaint in the United States District Court for the Eastern District of Michigan, seeking the forfeiture of Maquina Musical's broadcasting equipment. The next day, the government executed a writ of entry and a warrant of arrest, and proceeded to arrest (that is, seize) the equipment. On October 9, 1998, Maquina Musical – joined by several Radio Maquina listeners who were permitted to intervene in the action – filed a "verified complaint" in which it applied for a temporary restraining order and moved for a preliminary injunction, a dismissal of the government's forfeiture complaint for lack of subject matter jurisdiction, and an order quashing the in rem arrest warrant. After a hearing, the district court denied the application for a temporary restraining order. Subsequently, in a memorandum and order dated November 6, 1998, the district court denied the remainder of the relief sought by Maquina Musical. *See United States v. Any and All Radio Station Transmission Equipment (Maquina Musical)*, 29 F. Supp. 2d 393 (E.D. Mich. 1998).

In denying Maquina Musical's motion for a preliminary injunction, the district court assumed for the sake of argument that Maquina Musical could demonstrate that it would suffer irreparable harm without the injunction, *see Maquina Musical*, 29 F. Supp. 2d at 396 (citing *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), for the proposition that even brief deprivations of First Amendment freedoms constitute irreparable injury), and concluded that the risk of substantial harm to others was

not great. The district court, however, found that Maquina Musical's likelihood of success on the merits was low and that the public interest did not favor allowing it to broadcast without a license during the pendency of the proceedings. Balancing these factors, the district court concluded that Maquina Musical was not entitled to a preliminary injunction.

II. ANALYSIS

A. No. 98-2129 (Strawcutter)

The doctrine of primary jurisdiction "arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency." *United States v. Haun*, 124 F.3d 745, 749 (6th Cir. 1997) (citing *Reiter v. Cooper*, 507 U.S. 258, 268, 122 L. Ed. 2d 604, 113 S. Ct. 1213 (1993)). When the doctrine applies, court proceedings are stayed so that the agency may bring its special competence to bear on the issue. *See id.* Unfortunately, "[n]o fixed formula exists for applying the doctrine[.]" *United States v. Western Pacific. R. Co.*, 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956)). Rather, "in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.*

Those reasons, broadly speaking, are the desire for uniformity in adjudication and the belief that the decisionmaker with the most expertise and broadest perspective regarding a statutory or regulatory scheme will be most likely to resolve the issue correctly. *See id.* The doctrine has even been applied to the government itself.

See Far East Conference v. United States, 342 U.S. 570, 96 L. Ed. 576, 72 S. Ct. 492 (1952) (ordering an antitrust action brought by the United States as a shipper dismissed pursuant to the doctrine of primary jurisdiction following the intervention of, and motion to dismiss by, the Maritime Board, the relevant federal agency).

But the doctrine does not apply when the specially competent agency is itself the plaintiff. *See, e.g., United States v. Alcon Laboratories*, 636 F.2d 876, 888 (1st Cir. 1981) ("Deference to an agency's primary jurisdiction makes little sense in the context of an enforcement proceeding initiated by the agency."); *ICC v. All-American, Inc.*, 505 F.2d 1360, 1362 (7th Cir. 1974) ("It has been suggested . . . that, in cases where the appropriate administrative body is before the court, the doctrine should not apply since a principal function of the rule, acquainting the court with the agency's position concerning the matter, has been satisfied."); *CAB v. Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1974) ("When the agency chooses to go to the district court for enforcement, it makes little sense to refer the very question at issue to the agency."). Indeed, as the Second and Seventh Circuits have noted, a federal agency's decision to pursue a judicial remedy rather than an administrative one speaks volumes about its views regarding the necessity of administrative expertise. *See All-American, Inc.*, 505 F.2d at 1363; *ICC v. Maine Central R. Co.*, 505 F.2d 590, 594 (2d Cir. 1974) ("The very institution of suit in the courts by the relevant administrative body represents an exercise of its 'special competence.' ").

In essence, the district court held that a statute expressly authorizing the government to initiate a civil

action in the district courts cannot be invoked by the government when it sues on behalf of the very agency charged by the statute with special competence over the regulatory issues in question. *See* 47 U.S.C. § 510 (providing that the illegal use of broadcasting equipment subjects the equipment to seizure and forfeiture if the equipment was used "with willful and knowing intent" to violate license requirement) and 28 U.S.C. § 1355 (vesting the district courts with original jurisdiction over "any action or proceeding" for forfeiture "incurred under any Act of Congress" other than those within the jurisdiction of the Court of International Trade). We cannot agree, and therefore reverse the district court's order dismissing this action for lack of subject-matter jurisdiction.

B. No. 98-2396 (Maquina Musical)

1. Preliminary injunction

Whether a preliminary injunction should be granted is a decision left to the district court's sound discretion. *See, e.g., Allied Systems, Ltd. v. Teamsters Nat'l Automobile Transporters Industry Negotiating Committee*, 179 F.3d 982, 985-86 (6th Cir.), *cert. denied*, 145 L. Ed. 2d 313, 120 S. Ct. 401 (1999). On appeal, our review focuses on whether the district court abused that discretion. This court has said that a district court, in deciding whether to grant an injunction, abuses its discretion when it "applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *E.g., Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir. 1997).

Taken literally, the standard is difficult to understand. The idea of discretion connotes a reasoned, properly informed, deliberate choice between legally permissible alternatives. No judge deliberately chooses to apply an incorrect legal standard, misapply a correct legal standard, or rely upon clearly erroneous factual findings. Presumably, the standard as articulated in *Schenck* and numerous other cases is a shorthand way of expressing the idea that this court ordinarily extends a high degree of deference to the district court's decision, but does so only if the district court properly understood the pertinent law and applied it in a defensible manner to the facts as they appear in the record. Otherwise, affording deference to the district court makes little sense.

With this understanding in mind, reviewing the district court's order denying a preliminary injunction to Radio Maquina in light of the pertinent factors – whether the movant is likely to succeed on the merits, whether the movant would suffer irreparable harm without the injunction, whether an injunction would cause substantial harm to others, and whether an injunction would be in the public interest – becomes relatively straightforward. *See, e.g., Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087, 143 L. Ed. 2d 650, 119 S. Ct. 1496 (1999) (setting forth the pertinent factors for determining whether a preliminary injunction should be granted).

a. Irreparable harm

Maquina Musical's argument regarding irreparable harm is based on the premise that barring it from broadcasting would abridge both its First Amendment right to free speech and the First Amendment interests of its listeners to hear Radio Maquina's broadcasts. The district court assumed for the sake of argument that Zamora's "alleged deprivation of his First Amendment right to free speech by the government's seizure of his broadcasting equipment is sufficient to demonstrate irreparable injury." *See Maquina Musical*, 29 F. Supp. 2d at 396.

It need not have done so. As the Supreme Court has observed, "[t]he right of free speech does not include . . . the right to use the facilities of radio without a license." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227, 87 L..Ed. 1344, 63 S. Ct. 997 (1943). In *National Broadcasting Co.*, the Supreme Court broadly affirmed the Communications Act and its licensing standard of "public interest, convenience, or necessity" as valid exercises of congressional power, and held that denying a license on that ground, "if valid under the Act, is not a denial of free speech." *Id. See also Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64-65 (2d Cir. 1999) (per curiam) (rejecting the argument of unlicensed microbroadcasters that the FCC's broadcast licensing scheme is subject to public forum analysis and strict judicial scrutiny).

In the present case, Maquina Musical never applied for a broadcast license. For that reason, neither it nor Zamora has any First Amendment interest in its broadcasts. We therefore conclude that Maquina Musical lacks any plausible claim to the presumption of irreparable

harm. Maquina Musical also asserts that members of its listening audience – who intervened in this action and filed affidavits in support of its motion for injunctive relief – also have a First Amendment right "to hear the political, cultural and educational information conveyed to their community." But it follows that nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First Amendment right to broadcast them. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) (Stewart, J., concurring) (observing that the right to listen is implied by the right to speak).

In any event, we do not mean to suggest that this is the end of the analysis in determining whether Maquina Musical can possibly prevail in this case. Our point is just that the district court erred on the side of overgenerosity to Maquina Musical in assessing whether it had demonstrated a risk of irreparable harm. *Cf. Free Speech ex rel. Ruggiero*, 200 F.3d at 65 (concluding that the government had established that it would suffer irreparable harm without an injunction "simply by establishing that plaintiffs were broadcasting without a license").

b. Likelihood of success on the merits

The district court found that Maquina Musical had not demonstrated that it was likely to prevail on the merits. In reaching this conclusion, the district court noted that it was undisputed that Maquina Musical had broadcasted without a license and, indeed, that it had never applied for a license, a waiver, or an amendment to the pertinent FCC regulations barring microbroadcasting.

This, the district court concluded, was sufficient for the government to establish probable cause that Maquina Musical had violated 47 U.S.C. § 301 (which prohibits radio broadcasting without a license) and, by extension, that its broadcasting equipment was subject to forfeiture under 47 U.S.C. § 510(a), which subjects to forfeiture "any electronic, electromagnetic, radio frequency, or similar device, or component thereof . . . used . . . with willful and knowing intent to violate [47 U.S.C. §] 301 [or FCC regulations promulgated under § 301]."

Because Maquina Musical produced absolutely no evidence to rebut its violation of a facially valid federal statute, we believe that the district court was correct in its ultimate conclusion that the station had failed to demonstrate that it was likely to succeed on the merits. *See United States v. Certain Real Property 566 Hendrickson Blvd., Clawson, Oakland County, Mich.*, 986 F.2d 990, 995 (6th Cir. 1993) (noting that in forfeiture cases, the government is entitled to a judgment of forfeiture upon an unrebutted showing of probable cause).

Maquina Musical also contends that the FCC regulation announcing the moratorium on Class D licenses, 47 C.F.R. § 73.512(c), was an unconstitutional prior restraint on speech. In response, the government argues that even if the regulation was ultimately held to be unconstitutional, it would not matter, because the government's forfeiture case begins and ends with Maquina Musical's violation of 47 U.S.C. § 301. The district court concluded, however, that it lacked jurisdiction to entertain Maquina Musical's constitutional defenses because 28 U.S.C. § 2342

provides that the courts of appeals have exclusive jurisdiction "to enjoin, set aside, suspend . . . or to determine the validity of . . . all final orders of the [FCC]. . . . "

We disagree, "for the simple reason that no FCC order is being challenged." *United States v. Any and All Radio Station Transmission Equipment (Laurel Avenue)*, 169 F.3d 548, 554 (8th Cir.) (M. Arnold, J., concurring in the result), *reh'g granted*, 182 F.3d 1026 (8th Cir. 1999). Indeed, as Judge Morris Arnold said in his short but well-reasoned opinion in Laurel Avenue: "Until today I had not supposed that anyone could plausibly maintain that any court of the United States, properly seized of jurisdiction of a suit, did not also have jurisdiction to consider constitutional defenses to that suit." *See Laurel Avenue*, 169 F.3d at 554 (M. Arnold, J., concurring in the result). *Laurel Avenue* involved facts that are virtually identical to those of the present case, in that the government sought the in rem forfeiture of an unlicensed microbroadcaster's radio transmission equipment.

Congress presumably could have created a streamlined forfeiture remedy that excluded certain defenses by giving claimants the opportunity to raise those defenses in some other forum. But it did not do so. Forfeiture actions, although nominally civil, are quasi-criminal in nature. *See One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 700, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965). As a consequence, some of the protections to which criminal defendants are entitled also apply in forfeiture cases. *See, e.g., United States v. $53,082.00 in United States Currency*, 985 F.2d 245, 250 (6th Cir. 1993) (applying the Fourth Amendment exclusionary rule in a forfeiture case). We believe that this makes it even less likely that Congress

enacted a statute that allows the government to forfeit a person's property while denying the owner the right to defend himself by challenging the legal basis of the government's forfeiture case.

Although we conclude that the district court erred in holding that it lacked jurisdiction to adjudicate Maquina Musical's arguments, this does not mean that Maquina Musical is any closer to demonstrating that it is likely to succeed on the merits. With one exception, the cases Maquina Musical relies upon for the boilerplate propositions that restrictions on First Amendment rights must be "narrowly tailored" and that "prior restraints" on protected free speech are presumptively invalid have nothing to do with radio broadcasting, much less with unlicensed radio broadcasting. The one exception is *FCC v. League of Women Voters of California*, 468 U.S. 364, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984), which concerned the constitutionality of a statute prohibiting licensed broadcasters that accepted federal funding from engaging in "editorializing." Even in that opinion, the Court repeatedly observed that broadcasting may legitimately be regulated in ways that would be unconstitutional in other contexts. *See id.* at 374 ("Because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media").

c. Substantial harm to others

The district court concluded that it did "not believe that the absence of Hispanic radio programming outweighs what would amount to judicial sanction of an

unlicensed radio station." This appears to be more a weighing of the "substantial harm" factor against the "public interest" factor than strictly a consideration of whether the inability of Maquina Musical's audience to hear the station's broadcasts constitutes substantial harm. We agree, however, with the district court's conclusion. As previously stated in Part II.B.1.a. above, nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First Amendment right to broadcast them.

d. Public interest

Finally, the district court concluded that the public interest did not favor granting the injunction because the government has an interest in the uniform and consistent application of the Communications Act. Maquina Musical argues that "the district court erred as a matter law and fact" because the "policy of free speech is the very cornerstone of a democratic society." This is undoubtedly true, but we think that Maquina Musical avoids the issue by defining the question considerably more abstractly than the Supreme Court has been willing to do. As noted above, the Court has made it quite clear that unlicensed broadcasting is not considered free speech protected by the First Amendment. *See* Part II.B.1.a. above.

We express no opinion on whether the constitutionality of the challenged FCC regulation is an appropriate consideration in deciding the merits of this case. The district court may have been right when it concluded that even if the challenged regulation is unconstitutional, the statute is valid, and that Maquina Musical's violation of

the statute is the beginning and end of the government's forfeiture case. But before this court decides the issue, it should be resolved on the merits by the district court. We will therefore remand this case to the district court so that it can determine whether it wishes to adhere to its reasoning in light of its ability to consider the constitutionality of the FCC regulations.

2. Motion to dismiss

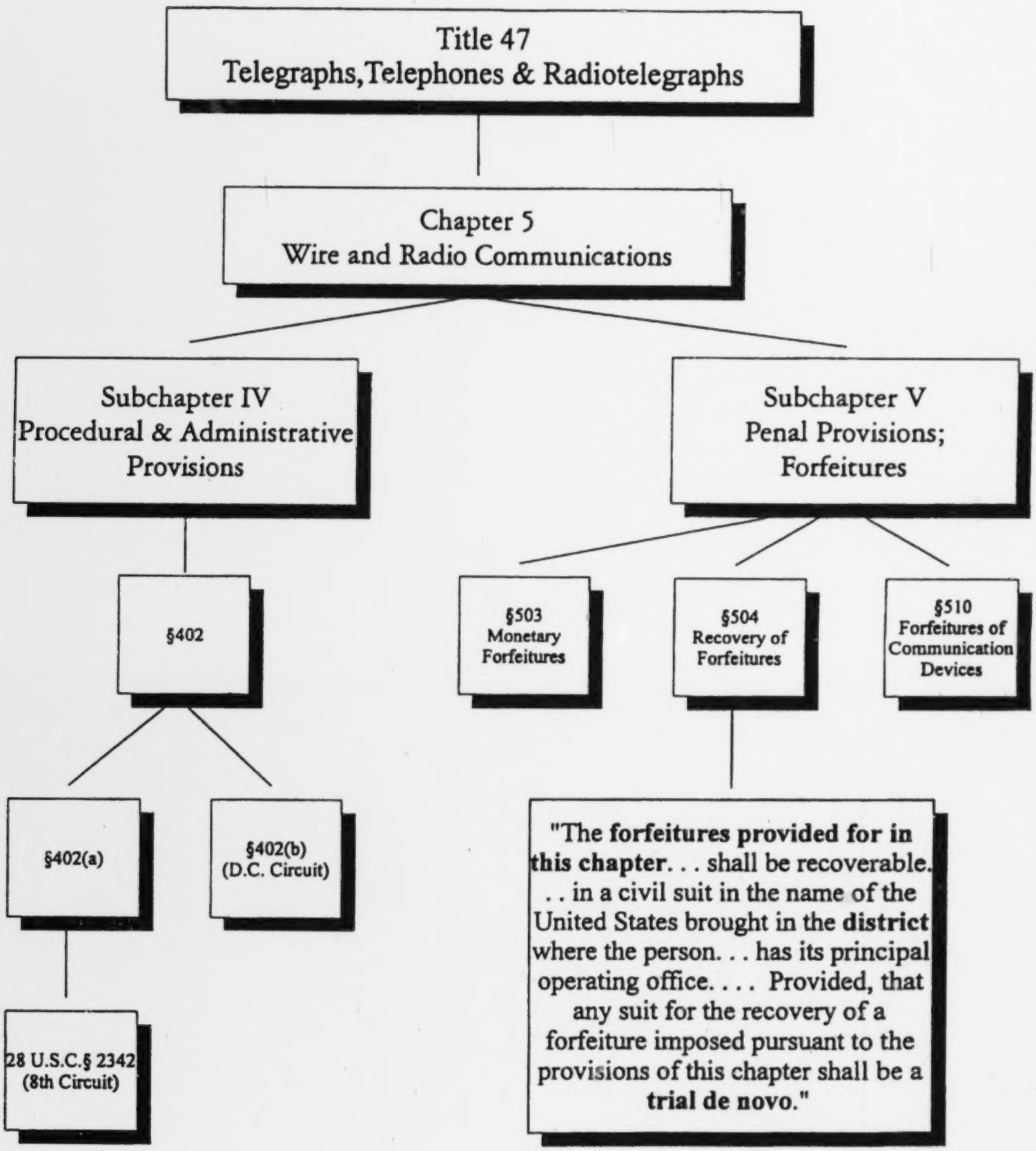
Maquina Musical is also appealing from the portion of the district court's order that denied the station's motion to dismiss the government's complaint. An order denying a motion to dismiss is not a "final decision" appealable under 28 U.S.C. § 1291 in the absence of special factors, none of which are present here. *Cf. Lickiss v. Drexler*, 141 F.3d 1220, 1222 (7th Cir.) (noting that a denial of a motion to dismiss based on qualified immunity is considered a final, appealable order if there are no material facts in dispute, because part of the harm sought to be averted by the doctrine of immunity is the necessity of standing trial), *cert. denied*, 525 U.S. 1002, 119 S. Ct. 513, 142 L. Ed. 2d 425 (1998). The denial is also not an immediately appealable interlocutory order within the meaning of 28 U.S.C. § 1292(a)(1). Finally, the doctrine of pendent appellate jurisdiction does not apply, because the issue of whether Maquina Musical's motion for a preliminary injunction should have been granted is not "coterminous with, or subsumed in" the issue of whether its motion to dismiss the government's complaint should have been granted. *See Brennan v. Twp. of Northville*, 78 F.3d 1152, 1158 (6th Cir. 1996). We therefore find no basis

to consider Maquina Musical's motion to dismiss as part of the present appeal.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court in No. 98-2129 (Strawcutter), which dismissed the government's forfeiture case sua sponte pursuant to the doctrine of primary jurisdiction, and **REMAND** the case for further proceedings. We **REMAND** No. 98-2396 (Maquina Musical) to the district court for reconsideration in light of its determination that the doctrine of primary jurisdiction precluded it from considering Maquina Musical's "constitutional defenses" to the government's forfeiture action. Concerning Maquina Musical's appeal from the district court's denial of its motion to dismiss the government's forfeiture complaint, we **DISMISS** the appeal for lack of jurisdiction.

The Statutory Framework



Supreme Court, U.S.
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No. 00-537

In the Supreme Court of the United States

ALAN FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the owner of equipment used for unlicensed, low power radio broadcasts can raise, as a defense to a forfeiture action brought by the government in district court, the validity of the Federal Communications Commission's regulations concerning low power radio stations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 207 F.3d 458. That opinion vacated an earlier opinion of the court (Pet. App. A14-A35), which was reported at 169 F.3d 548. The opinion of the district court (Pet. App. A36-A45) is reported at 976 F. Supp. 1255.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2000. A petition for rehearing was denied on July 5, 2000 (Pet. App. A46). The petition for a writ of

certiorari was filed on October 3, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act) seeks "to maintain the control of the United States over all the channels of radio transmission." 47 U.S.C. 301. The Act therefore provides that "[n]o person shall use or operate any apparatus for the transmission of * * * signals by radio" without "a license in that behalf granted under the provisions of this [Act]." *Ibid.* The Act authorizes the Federal Communications Commission (FCC or Commission) to grant radio licenses when it finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). The Act also authorizes the Commission to issue rules and regulations regarding license applications and orders regarding specific license applications. 47 U.S.C. 154(i).

Section 402(a) of Title 47 of the United States Code specifies that any challenge to the validity of an FCC rule or regulation must be brought under the Administrative Orders Review Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), which in turn provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342 (1994 & Supp. IV 1998). See also *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942) (FCC's promulgation of regulations is an order reviewable under Section 402(a)). Section 402(b) of Title 47 further provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review

FCC orders regarding individual license applications, modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. IV 1998).

The Communications Act provides a number of mechanisms to enforce its licensing requirement, including cease-and-desist orders (47 U.S.C. 312 (1994 & Supp. IV. 1998)), injunctions (47 U.S.C. 401(a)), and criminal penalties (47 U.S.C. 501). The Act also provides for a monetary forfeiture penalty against those who willfully and repeatedly fail to comply with the Act. 47 U.S.C. 503(b). The government recovers that penalty in a civil suit in district court, where there "shall be a trial de novo." 47 U.S.C. 504(a).

Congress determined, however, that the FCC needed additional authority to ensure that owners would not retain radio equipment used to violate the Act. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 59 (1982) (Conf. Rep.). Therefore, in 1982, Congress amended the Act to provide that any device used with willful and knowing intent to violate the prohibition on broadcasting without a license "may be seized and forfeited to the United States," Communications Amendments of 1982, Pub. L. 97-259, Tit. I, § 125, 96 Stat. 1098 (47 U.S.C. 510(a)), "thus preventing its continued operation" (Conf. Rep. 58). The amendment further provides that "[a]ny property subject to forfeiture to the United States under this section may be seized by the Attorney General of the United States upon process issued * * * by any district court of the United States having jurisdiction over the property." 47 U.S.C. 510(b).

2. In 1996, the FCC received a complaint from a radio station in Rochester, Minnesota, that an unlicensed radio station was broadcasting at a frequency of 97.7 MHz. The FCC identified the unlicensed station as "the BEAT," owned and operated by petitioner. The

FCC sent petitioner a warning letter, which informed him that 47 U.S.C. 301 prohibits broadcasting without a license. Pet. App. A4, A16. Petitioner refused to stop broadcasting. *Id.* at A5.

The United States filed suit in district court to obtain authorization to seize petitioner's transmission equipment in accordance with 47 U.S.C. 510. Petitioner admitted that his equipment was used to broadcast without the required license. Pet. App. A40. Nevertheless, he opposed forfeiture on the ground that the FCC's regulations at that time, which prohibited the licensing of low power radio stations such as petitioner's, violated his rights under the First Amendment and other constitutional and statutory provisions. *Id.* at A38.[1]

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[1] Petitioner was broadcasting at approximately 20 watts. Pet. App. A16. In 1996, when this dispute arose, the Commission generally would not license low power radio stations, *i.e.*, stations operating at less than 100 watts. Until 1978, the Commission had licensed low power (typically 10 watt) educational stations. In 1978, however, the Commission explained that it would no longer license such stations because they "function in a manner which defeats the opportunity for other more efficient operations which could serve larger areas, and bring effective noncommercial educational radio service to many who now lack it." *In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240, 248 (1978), aff'd on recons., 70 F.C.C.2d 972, 973 (1979). After the events at issue in this case, the Commission determined that low power stations that meet certain conditions will not interfere with existing full power FM stations. It therefore issued new rules establishing two classes of low power noncommercial radio stations, one at a maximum of 100 watts and one at a maximum of 10 watts. *In re Creation of Low Power Radio Service*, 15 F.C.C.R. 2205 (rel. Jan. 27, 2000), aff'd on recons., FCC 00-349 (rel. Sept. 28, 2000). A petition to review the newly adopted low power rules is pending before the D.C. Circuit. *National Ass'n of Broad.* v. *FCC*, No. 00-1054 (argued Nov. 28, 2000).

The district court granted judgment on the pleadings in the government's favor. Pet. App. A36-A45. "Because [petitioner] admit[ted] that he used the radio equipment to broadcast without an FCC license," the court held, "there [was] no material issue remaining in regards to a violation of 47 U.S.C. § 301." Pet. App. A40. In so holding, the court declined to consider the validity of the FCC's low power regulations because "jurisdiction" over that question "is properly conferred on the Court of Appeals pursuant to 47 U.S.C. § 402(a)-(b)." Pet. App. A44.

3. The United States Court of Appeals for the Eighth Circuit initially reversed and remanded in a decision in which each judge on the panel issued a separate opinion. Pet. App. A14-A35. Judge McMillian wrote the lead opinion (*id.* at A15-A31), Judge Morris Sheppard Arnold issued a concurring opinion (*id.* at A31-A32), and Judge John T. Noonan, sitting by designation, dissented (*id.* at A32-A35). On panel rehearing, however, the court of appeals unanimously adopted the reasoning of Judge Noonan's initial dissenting opinion and affirmed the judgment of the district court. *Id.* at A1-A13.

The court of appeals observed that petitioner's "defense is exclusively focused on the validity of the [low power broadcast] regulations." Pet. App. A12. Under the Communications Act, the court noted, the courts of appeals have "exclusive jurisdiction" over "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission." *Ibid.* (quoting 47 U.S.C. 402(a) and 28 U.S.C. 2342 (1994 & Supp. IV 1998)). The court of appeals stated that "[i]t is hard to think of clearer language confining the review of regulations to the Courts of Appeal[s]." *Ibid.*

Moreover, the court explained, the "Supreme Court has authoritatively determined that the exclusive jurisdiction of the Court of Appeals over rulemaking by the FCC may not be evaded by seeking to enjoin a final order of the FCC in the district court." Pet. App. A12 (citing *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984)). The court reasoned that "[a] defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *Ibid.* Regardless of the "way it is done, to ask the district court to decide whether the regulations are valid violates the statutory requirements." *Ibid.* Because the district court "has no jurisdiction to decide the validity of the regulations," the court held, the district court "has no jurisdiction to consider the defense." *Ibid.*

The court of appeals explained that the statutory requirement of an initial agency decision followed by review in the court of appeals makes sense for three reasons. Pet. App. A13. First, it "ensure[s] review based on an administrative record made before the agency charged with implementation of the statute." *Ibid.* Second, it "ensure[s] uniformity of decision-making because of uniform factfinding made by the agency." *Ibid.* Finally, it "bring[s] to bear the agency's expertise in engineering and other technical questions." *Ibid.*

The court of appeals suggested that petitioner's case "might be different" if he "had no way of obtaining judicial review of the regulations." Pet. App. A13. As the court explained, however, petitioner "could have obtained review by applying for a license and asking for a waiver of the regulations; rejection of his request would have permitted appeal to the circuit." *Ibid.* The court

therefore rejected petitioner's refusal to "follow the procedures established by law" and refused to allow an "end run" around "the statutory channels provided for constitutional claims." *Ibid.*

The Eighth Circuit, with four judges dissenting, denied petitioner's request for en banc review. Pet. App. A46.

ARGUMENT

The decision of the court of appeals is correct. Although the decision conflicts with the current position of the Sixth Circuit, this case is not an appropriate one in which to resolve the conflict because its resolution will not affect the ultimate outcome of the case. Moreover, there is reason to believe that the Sixth Circuit may modify its view to conform to the decision of the court of appeals here. Finally, because the FCC has made changes to the regulations challenged by petitioner, it is not clear that the conflict is of continuing importance. Review by this Court is therefore not warranted at this time.

1. a. The court of appeals correctly affirmed the district court's conclusion that it lacked jurisdiction to entertain petitioner's First Amendment challenge to the FCC's licensing regulations.[2] As the court of appeals held, the Communications Act confines review

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[2] As we have noted above, in the district court, petitioner challenged the regulations on a variety of constitutional and statutory grounds. See p. 4, *supra*. His petition for a writ of certiorari, however, concerns only his First Amendment challenge. See Pet. i (referring to "a constitutional defense"), 11-12 (describing "[t]he issue in this case" as "whether Federal District Courts have jurisdiction to consider the constitutionality of FCC regulations"), 27-30 (relying on the importance of the First Amendment issues at stake to support the request for review).

of FCC regulations to the courts of appeals. See Pet. App. A12-A13.

The Communications Act expressly provides that "*[a]ny* proceeding to enjoin, set aside, annul, or suspend *any order* of the Commission under this chapter (except those appealable under subsection (b) of this section[3]) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." 47 U.S.C. 402(a) (emphasis added). That chapter in turn provides, in relevant part, that "[t]he court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or *to determine the validity of*—(1) *all final orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1) (emphasis added). This Court long ago held that "the Commission's promulgation of [its] regulations is an order reviewable under [47 U.S.C.] 402(a)." *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942). As the court of appeals concluded, "[i]t is hard to think of clearer language confining the review of regulations to the Courts of Appeal[s]." Pet. App. A12.

Moreover, as the court of appeals explained (Pet. App. A12), this Court has held that the exclusive jurisdiction of the courts of appeals over FCC rulemaking may not be evaded by seeking to enjoin a final order of the FCC in the district court. See *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). "A

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[3] Subsection (b) of 47 U.S.C. 402 gives the United States Court of Appeals for the District of Columbia Circuit jurisdiction over FCC orders regarding individual license applications, modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. IV 1998).

defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." Pet. App. A12. Therefore, in this case, just as in *ITT*, the only "appropriate procedure for obtaining judicial review of the agency's [regulatory actions] was appeal to the Court of Appeals as provided by statute." 466 U.S. at 468.

As the court of appeals recognized, the statutory scheme's requirement of an initial regulatory decision by the Commission followed by review in the court of appeals makes eminent sense. Pet. App. A13. It "ensure[s] review based on an administrative record made before the agency charged with implementation of the statute." *Ibid.* In addition, it "ensure[s] uniformity of decisionmaking because of uniform factfinding made by the agency." *Ibid.* Finally, it "bring[s] to bear the agency's expertise in engineering and other technical questions." *Ibid.*

b. Petitioner mistakenly claims (Pet. 22-24) that Section 402(a) is not applicable to his challenge because the FCC has not issued an "order" from which he could appeal. Contrary to petitioner's contention that "the FCC regulatory scheme disallowing micro-broadcasting does not constitute an appealable 'order' under §402(a)" (Pet. 22), the promulgation of regulations is (as we have explained above) an "order" within the meaning of Section 402(a). See *Columbia Broad. Sys.*, 316 U.S. at 425. Petitioner's lack of standing to challenge those regulations directly (see Pet. 22) does not negate the existence of an "order" triggering the applicability of Section 402(a).

To the extent that petitioner's argument is based on the absence of any order that he personally can appeal at this time, petitioner himself is responsible for that

situation. He could have petitioned the FCC for a rule-making to repeal or modify its low power broadcasting regulations. See 47 C.F.R. 1.401(a) (providing that "[a]ny interested person may petition for the issuance, amendment or repeal" of a "rule or regulation" of the Commission). If the Commission denied the request, or granted it in a manner that aggrieved petitioner, he could have appealed that order to the court of appeals in accordance with Section 402(a).

In the alternative, petitioner could have raised his challenge to the FCC's low power broadcasting policies by filing an application for a broadcast license, accompanied by a request for a waiver of the FCC's low power regulations. If the Commission denied his application and request for waiver, petitioner could then have appealed the denial to the United States Court of Appeals for the District of Columbia Circuit, where he could have asserted that the regulations were constitutionally invalid. See 47 U.S.C. 402(b)(1); note 3, *supra*. See generally *Turro* v. *FCC*, 859 F.2d 1498, 1499 (D.C. Cir. 1988). The fact that petitioner sought to bypass the Communications Act's judicial review procedures cannot vest the district courts with jurisdiction to review FCC rules in contravention of the Act's command that review of those rules is the exclusive province of the courts of appeals. See *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000).

Petitioner's contention (Pet. 22, 26-27) that he submitted a request that the FCC waive its minimum power requirements but the Commission did not act on the request does not alter that analysis. Waiver of the minimum power requirements would not permit petitioner to operate his radio station unless he also applied for and received a license. See 47 U.S.C. 301, 308 (1994 & Supp. IV 1998). FCC regulations therefore contem-

plate that a request for a waiver of a specific requirement for operation of a radio station will be made in conjunction with an application for a license to operate a station. See 47 C.F.R. 73.3566(a). And it is undisputed that petitioner never submitted a license application.[4] Moreover, the FCC's failure to act on a license application or waiver in a timely manner is subject to review by mandamus in the court of appeals. See *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984). Thus, the contention that the FCC failed to act on petitioner's waiver request provides no basis for district court review of FCC regulations.[5]

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[4] Although the district court and the court of appeals assumed without deciding that petitioner had submitted a valid waiver request, Pet. App. A7, petitioner's request was facially deficient quite apart from the fact that it was not made in conjunction with a license application. A request to waive the FCC's low power rules must demonstrate "good cause" (47 C.F.R. 1.3) and "set forth the reasons" for the request (47 C.F.R. 73.3566(a)). In a letter responding to the FCC's warning letter, petitioner's counsel wrote that he "requests a waiver of the prohibition on micro broadcasts of less than 100 watts." C.A. App. 30. That summary request with no supporting material plainly failed to meet the minimum regulatory requirements and thus fell short of what was necessary to constitute a valid waiver request. See *Rio Grande Family Radio Fellowship, Inc.* v. *FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968) (holding that "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action").

[5] In view of the availability of mandamus to prevent unreasonable delay in agency action, there is no merit to petitioner's claims (Pet. 26-27) that the FCC has an unlimited amount of time to rule on a valid waiver request and that the Commission could use the waiver process to insulate "a blatantly unconstitutional regulation" from review. Furthermore, as we have explained, someone who wants to make a constitutional challenge to an existing regulation

c. Petitioner also errs in contending (Pet. 20-22) that the decision in this case is inconsistent with 47 U.S.C. 504(a), which provides for a "trial de novo" in district court when the FCC assesses a monetary forfeiture. Petitioner's argument that this provision permits him "to assert all available defenses," including the invalidity of the low power regulations (Pet. 22), is flawed in two respects.

First of all, district court jurisdiction over the property forfeiture in this case arises under 47 U.S.C. 510 rather than 47 U.S.C. 504(a), and it is far from clear that Congress intended for the monetary forfeiture procedures described in Section 504(a) to apply to property forfeiture actions brought under the later-enacted Section 510.[6] Furthermore, the requirement of a "trial de novo" does not necessarily encompass a requirement that the trial entail consideration of the validity of the FCC's low power rules. The asserted invalidity of the FCC's low power broadcasting regulations does not speak to the gravamen of the government's complaint, which is that petitioner chose to broadcast without obtaining a license as required by the Act. See *United States* v. *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d

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can do so by filing a petition requesting the FCC to repeal or modify the objectionable regulation, see 47 C.F.R. 1.401(a), and may obtain judicial review of the Commission's action on that petition in the court of appeals, 47 U.S.C. 402(a).

[6] Although Section 504(a) states that it applies to "any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter," it also states that "forfeitures provided for in this chapter shall be payable into the Treasury," a provision that appears not to apply to property and that therefore suggests that the Section applies only to monetary forfeitures. See 47 U.S.C. 504(a).

543, 549-550 (6th Cir. 2000) (holding that First Amendment does not provide a defense to the forfeiture of radio equipment used in unlicensed low power broadcasting).[7]

2. Petitioner points (Pet. 11-20) to a conflict between the decision in this case and the Sixth Circuit's decision in *United States* v. *Any and All Radio Transmission Equipment (Strawcutter)*, 204 F.3d 658 (6th Cir. 2000). There, the Sixth Circuit held that a district court may, in ruling on a forfeiture action against radio equipment used for unlicensed broadcasting, consider whether the low power regulations are unconstitutional. *Id.* at 667. Although the two cases are in disagreement on the jurisdictional question, this Court's review is not warranted at this time for several reasons.[8]

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[7] Petitioner's assertion (Pet. 24-25) that the decision of the court of appeals "departs from established federal jurisdiction and standing principles when a party faces an enforcement action brought by the government" is unfounded. Petitioner's sole support for that proposition is a single sentence from a treatise on federal courts that does not address the question at issue here—whether a defendant in an enforcement action can raise an issue in that action when resolution of that issue is committed by statute to another forum and the defendant has bypassed available opportunities to raise the issue in the forum to which it is statutorily committed.

[8] Petitioner mistakenly suggests (Pet. 17-18) that the decision of the court of appeals in this case also conflicts with *Pleasant Broadcasting Co.* v. *FCC*, 564 F.2d 496 (D.C. Cir. 1977). In that case, two licensees requested appellate review of FCC monetary forfeiture orders, issued under 47 U.S.C. 503(b), claiming that they were operating under a "misunderstanding" of the Commission's rules and that the Commission had applied its rules "arbitrarily." 564 F.2d at 499-500. The District of Columbia Circuit held that Section 504(a) grants district courts exclusive jurisdiction to review the FCC monetary forfeiture orders, regardless of whether the FCC or the licensee initiates the lawsuit. 564 F.2d at 502. But

a. First, this case is not an appropriate one in which to resolve the conflict, because its resolution will not affect the ultimate outcome of the case. The invalidity under the First Amendment of the FCC's minimum power requirements for radio stations would not provide a defense to forfeiture based on broadcasting without a license.

It has long been settled that the Act's prohibition on broadcasting without a license does not violate the First Amendment. *National Broad. Corp.* v. *United States* (*NBC*), 319 U.S. 190, 227 (1943) ("The right of free speech does not include * * * the right to use the facilities of radio without a license."); see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 (1994); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-389 (1969). Indeed, petitioner concedes (Pet. 28) that the Communications Act's licensing requirement is valid. Thus, even if petitioner is correct that he would qualify for a license but for an unconstitutional impediment to his receiving one, he still has no entitlement to broadcast without one. If the rule were otherwise, the "confusion and chaos" that was characteristic of the airwaves before effective government regulation—in which, with "everybody on the air, nobody could be heard," *NBC*, 319 U.S. at 212—would necessarily reappear because of the inevitable interference.

Pleasant Broadcasting did not hold that a district court would have authority to consider a challenge to a monetary forfeiture order based on an attack on the validity of the underlying regulations. Thus, even if we assume that case law regarding monetary forfeitures is applicable to this property forfeiture case, but see p. 12 & note 6, *supra*, *Pleasant Broadcasting* does not conflict with the holding in this case that district courts lack jurisdiction to assess the validity of FCC regulations.

Strawcutter itself and a subsequent Sixth Circuit decision support that conclusion. The court noted in *Strawcutter* that "[t]he district court may have been right when it concluded that even if the challenged regulation is unconstitutional, the statute is valid, and that [the broadcaster's] violation of the statute is the beginning and end of the government's forfeiture case." 204 F.3d at 668. And, in *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d at 549-550, the Sixth Circuit affirmed a district court's ruling that the First Amendment did not provide a defense to forfeiture of radio equipment used in unlicensed low power broadcasting. The court stated: "Because [the claimant] does not have a First Amendment right to broadcast his views on an unlicensed radio station, this argument does not present a defense to forfeiture." *Id.* at 549-550. As a practical matter, therefore, it ultimately makes no difference whether the district court has jurisdiction over petitioner's challenge to the FCC's regulations, because that challenge cannot immunize petitioner from the consequences of his violation of the Act.

Indeed, it is precisely because the outcome on the merits of this sort of case is so clear that the Second Circuit recently avoided resolving this very jurisdictional question. *Prayze FM* v. *FCC*, 214 F.3d 245, 251 (2d Cir. 2000). See Pet. 13 n.3. In *Prayze*, the Second Circuit affirmed the grant of a preliminary injunction against an unlicensed low power broadcaster. The court declined to "resolve the jurisdictional question" because "even assuming" that the district court would have jurisdiction to evaluate the constitutionality of the low power regulations the FCC had demonstrated that it would likely prevail. See *Prayze*, 214 F.3d at 251. Because the unlicensed broadcaster's attack on the low

power rules lacked merit, the Second Circuit saw no need to resolve the conflict identified by petitioner. *Ibid.*

b. This Court's resolution of the conflict is also not necessary at this time because there is reason to believe that the Sixth Circuit may reconsider its current position. As petitioner has noted, "the Sixth Circuit's opinion * * * relied in part on the now-vacated Eighth Circuit opinion." Pet. 17. Specifically, the Sixth Circuit's decision in *Strawcutter* adopted Judge Morris Arnold's concurrence in the original panel opinion in this case. 204 F.3d at 667. One month after the *Strawcutter* decision was issued, however, Judge Arnold and Judge McMillian voted to vacate the prior opinions (including Judge Arnold's concurrence) and to affirm the district court in accordance with the views of Judge Noonan. It is entirely possible, given the Eighth Circuit's (and Judge Arnold's) ultimate decision in this case, that the Sixth Circuit will likewise reconsider its view when an occasion to do so arises.[9]

For that reason, two courts of appeals have questioned the continuing vitality of the *Strawcutter* opinion. The Second Circuit, for example, noted the decision in *Strawcutter* but observed that "in reaching that result the Sixth Circuit relied in relevant part on an Eighth circuit opinion that was superseded." *Prayze*, 214 F.3d at 251. Similarly, the Ninth Circuit, after explaining that it found the reasoning of the court

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[9] The position of the Eighth Circuit, in contrast, now appears settled. The court of appeals recently reaffirmed and extended the holding of the present case in *United States* v. *Neset*, No. 98-3539, 2000 WL 1742042, at *5 (8th Cir. Nov. 28, 2000), in which it held that, in adjudicating the government's request for injunctive relief under 47 U.S.C. 401(a), a district court also lacks jurisdiction to consider the validity of the FCC's low power rules.

of appeals in this case "persuasive," cited *Prayze*, "pointing out the Sixth Circuit's reliance on now out-of-date Eighth Circuit case law." *United States* v. *Dunifer*, 219 F.3d 1004, 1007 & n.7 (2000).[10]

Further doubt as to the vitality of the Sixth Circuit's position has been created by another Sixth Circuit decision issued just two months after the decision in this case. In *La Voz Radio de La Communidad* v. *FCC*, 223 F.3d 313, 318 (2000), the Sixth Circuit held that a district court lacked jurisdiction to consider the validity of the FCC low power rules in the context of a law suit for injunctive relief initiated by the broadcaster. The *La Voz* court distinguished *Strawcutter* on the ground that in *Strawcutter* there was no final order, the rationale offered by Judge Arnold's concurring opinion. 223 F.3d at 320. Judge Arnold's subsequent decision to abandon that rationale in this case calls into question the distinction relied upon by the Sixth Circuit in *La Voz*. Moreover, the fact that *Strawcutter* has not

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[10] The court in *Dunifer* noted that, in *Dougan* v. *FCC*, 21 F.3d 1488 (9th Cir. 1994), the court had denied a petition to review an FCC monetary forfeiture order because the district court is the proper court to consider the validity of forfeiture orders. *Id.* at 1491. The petitioner in *Dunifer* also raised the validity of the underlying regulations. *Ibid.* The *Dunifer* court stated that *Dougan* "relied too broadly on *Pleasant Broadcasting*, in which the parties did not challenge the underlying regulations, but merely asserted standard defenses to the validity of the FCC orders." 219 F.3d at 1008 n.8. Nevertheless, the court in *Dunifer* reiterated that *Dougan* remains good law "at least with respect to monetary forfeitures." *Id.* at 1007 n.6. See p. 12 & note 6, *supra*. Thus, contrary to petitioner's contention (Pet. 19 n.6), the Ninth Circuit's case law is not "unsettled." Moreover, any disagreement within the Ninth Circuit does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

been applied by the Sixth Circuit to actually invalidate a forfeiture on the merits further diminishes that decision's precedential force.

c. A final consideration that counsels against review by this Court at this time is the FCC's recent adoption of new rules authorizing low power broadcasting. See note 1, *supra*. That action may significantly reduce the number of FCC forfeiture actions. As petitioner emphasizes (Pet. 6), in the past many individuals may have felt frustration with the agency's prohibition on low power broadcasting. Now, however, more than one thousand persons have so far applied for low power licenses under the new rules. FCC News Release (Sept. 15, 2000) (available at http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0039.html). The FCC's new low power rules may therefore substantially reduce the importance of the question presented in this case, which arose under the prior regulatory regime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

ALAN FRIED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent United States of America ("the Government") spends a significant portion of its Brief in Opposition to the Petition for a Writ of Certiorari ("Opp. Brf.") attempting to convince this Court that the Eighth Circuit's decision below was correct. *See* Opp. Brf. at 7-13. Not only are such arguments erroneous (as pointed out in Alan Fried's Petition for a Writ of Certiorari ("Petition") and below), but they also gloss over the clear, irreconcilable split between the circuits on what the Eighth Circuit describes as "an important [question] for the statutory scheme created by Congress for the regulation of broadcasting." *U.S. v. Any and All Radio Station Transmission Equip., et al., (Laurel Avenue)*, 207 F.3d 458, 462 (8th Cir. 2000), A-11. In this reply, Petitioner Alan Fried ("Fried") responds, first, to the Government's assertions regarding the conflicts between the circuits on the issue raised in his Petition and, second, to the Government's incorrect arguments concerning the ultimate merits of this case.

I. THE GOVERNMENT CANNOT DISPUTE THE FACT THAT A DIRECT SPLIT EXISTS AMONG THE CIRCUITS ON AN IMPORTANT QUESTION INVOLVING THE REGULATION OF BROADCASTING.

The Government concedes, as it must, that a clear conflict exists on the jurisdictional issue in this case between the Eighth and Sixth Circuits, but argues that this Court's "review is not warranted at this time." Opp. Brf. at 13. In attempting to convince this Court to deny certiorari, the Government lapses into an analysis of the merits of Petitioner's argument, claiming that the "invalidity under the First Amendment of the FCC's minimum power requirements for radio stations would not provide a defense to forfeiture based on broadcasting without a license." Opp. Brf. at 14. The Government's argument is incorrect, as set forth more extensively in the second section of this brief, but the ultimate question of

whether Fried's constitutional defenses to the forfeiture action are meritorious or not is entirely irrelevant to the issue of whether he can *raise* these arguments *at all* in the District Court. The Sixth Circuit in the *Strawcutter* case clearly held that a microbroadcaster could raise constitutional defenses when the Government brought a forfeiture action. *United States v. Any & All Radio Station Transmission Equip. ("Strawcutter/Maquina Musical")*, 204 F.3d 658, 667 (6th Cir. 2000). Likewise, the D.C. Circuit in *Pleasant Broadcasting v. F.C.C.*, 564 F.2d 496 (D.C. Cir. 1977), held that broadcasters must raise defenses in the District Court, not the Appellate Court, in forfeiture actions. Conversely, the Eighth Circuit held the exact opposite in the case below. *Laurel Avenue, supra.*

The Government argues that review by this Court is unwarranted because "there is reason to believe the Sixth Circuit may reconsider its current position." Opp. Brf. at 16. But apart from noting the fact that the Sixth Circuit in *Strawcutter* relied in part on Judge Morris Arnold's now vacated opinion in the case below, the Government offers absolutely no support for this clairvoyant claim. The Government tries to cast further doubt on the "vitality" of the Sixth Circuit's *Strawcutter* ruling by pointing to a subsequent Sixth Circuit decision, *La Voz Radio de La Communidad v. FCC*, 223 F.3d 313, 318 (6th Cir. 2000). But the decision in *La Voz*, which, contrary to the Government's contention (Opp. Brf. at 17) nowhere cites to Judge Arnold's concurring opinion in the previous *Laurel Avenue* decision, in fact clearly supports the continuing viability of *Strawcutter* in the Sixth Circuit. Unlike the microbroadcaster in *Strawcutter*, the broadcaster in *La Voz* initiated an action in federal district court *against* the Government. As the Sixth Circuit explained:

> It is one thing to say, as this court did in *Strawcutter*, that a microbroadcaster may raise constitutional arguments as a shield to defend itself in a forfeiture action brought by the government when the forfeiture action was not preceded by any formal administrative action. But it is

> entirely another thing to say that a microbroadcaster can initiate an action in the district court as a sword against the possibility of adverse administrative action in the future.

La Voz, 223 F.3d at 320. Far from undercutting Fried's argument, *La Voz* actually supports his arguments on the merits of the case while also further demonstrating the need for this Court to reach the vitally important jurisdictional issue at the heart of this case.[1]

A recent opinion by the Eighth Circuit, *United States v. Neset*, No. 98-3539, 2000 WL 1742042 (8th Cir. Nov. 28, 2000), demonstrates the continued viability of the *Strawcutter* decision. While two Eighth Circuit judges adopted the previous *Laurel Avenue* opinion under review here (including Judge McMillian, who sat on both panels), Circuit Judge Heany dissented in *Neset*, stating:

> I agree with the Sixth Circuit's decision in . . . *Strawcutter*, that district courts in this type of case have jurisdiction to hear First Amendment challenges to the Federal Communication Commission's prohibition of microbroadcasting in the context of an enforcement action filed

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[1] The Government attempts to diminish *Strawcutter*'s precedential force by claiming that it has not been applied by the Sixth Circuit to actually invalidate a forfeiture action. Opp. Brf. at 17-18. But this observation misses the mark for several reasons. First, the decision is less than a year old, so it should not be surprising that this case or a similar case in the Sixth Circuit addressing the substantive arguments concerning microradio regulations has not yet worked its way up to the appeals court. More importantly, however, the *Strawcutter* case was a jurisdictional decision, holding that microbroadcasters, like Fried, are entitled to raise defenses when the Government pursues them in an enforcement action. Accordingly, the Sixth Circuit sent the case back to the District Court, where the microbroadcaster may raise whatever defenses he wishes in a trial *de novo*, with the District Court then deciding the ultimate merits of those defenses.

> against them. Accordingly, I would remand to the district court for further proceedings.

The continuing conflicts, even among judges on the Eighth Circuit itself, demonstrate not only the continued viability of *Strawcutter*, but also the urgent need for this Court to resolve the conflict among the circuits.

Moreover, far from questioning the continuing viability of *Strawcutter*, as the Government contends (Opp. Brf. at 16), the Second and Ninth Circuits have in fact noted the sharp contrast between the appeals courts on the issue in need of resolution by this Court and presented in this Petition. *See* Fried's Petition at 12, 19 n.6. And contrary to the Government's assurance (Opp. Brf. at 17 n.10), the Ninth Circuit itself is conflicted over the proper forum to raise challenges to FCC regulations. The Ninth Circuit in *U.S. v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000), held that a microbroadcaster could not raise constitutional arguments to a Government enforcement action, while in *Dougan v. FCC*, 21 F.3d 1488, 1489 (9th Cir. 1994), the same circuit unquestionably held that a broadcaster challenging the "constitutionality of the licensing regulations" must proceed in District Court.[2] While conflict within a circuit itself is not reason alone for this Court to grant certiorari, the unsettled state of the law between the Sixth, Eighth, and D.C. Circuits, in addition to the conflicting opinions in the Ninth Circuit, make it all the more necessary for this Court to resolve the issue.

Last, the Government claims that new rules recently adopted by the Federal Communications Commission ("FCC") counsel against this Court reviewing the decision below. As Fried acknowledged in his Petition, the

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[2] Nothing in *Dougan* suggests, as the Government contends (Opp. Brf. at 17 n.10), that its holding is limited to monetary as opposed to forfeitures of communications devices. As set forth in the next section of this reply brief, both monetary forfeitures at issue in *Dougan* and property forfeitures at issue in the instant case are governed by 47 U.S.C. § 504(a), which demands a trial *de novo* in District Court.

FCC has changed its rules to permit new microbroadcasters to apply for licenses, but the same rules flatly disallow any microbroadcaster who had previously engaged in unlicensed broadcasting, including Fried, from applying for licensure. *See* Petition at 6 n.1. Thus, contrary to FCC's contention (Opp. Brf. at 18), the new rules will not impact the numerous microradio cases ongoing throughout the country. Indeed, the fact that microbroadcasters who initially challenged the regulations are now foreclosed from legal broadcasting at all not only in itself raises constitutional issues (and keeps those cases from becoming moot), but ensures that the jurisdictional issue presented in this Petition will continue to arise. Accordingly, the need for resolution by this Court is grave.

II. THE GOVERNMENT'S POSITION ON THE MERITS OF THE CASE CONTRADICTS STATUTORY LANGUAGE AND RELEVANT CASE LAW.

The Government devotes the first portion of its reply brief to the merits of the instant matter, arguing that the Eighth Circuit decision was correct. Unquestionably, however, the Sixth Circuit, examining the exact same statutory provisions, came to the exact opposite conclusion. The crucial question for this Court in deciding whether to grant a writ is not whether the Eighth Circuit was correct, as the Government argues, but whether there is disagreement among the circuits on an important issue.

In its opposition brief, the Government slightly elaborates upon the cursory analysis of the statutory provisions contained in the decision below. In his Petition (at 20-26), Fried sets forth extensively why the Eighth Circuit's conclusion that the Appellate Court, rather than the District Court, has jurisdiction in this matter was wrongly decided under applicable law. Those arguments, largely unanswered by the Government in its opposition brief, will not be repeated here. Instead, Fried below responds

to the few additional arguments made by the Government on the merits question in this case not covered in Fried's Petition.[3]

The Government makes the specious argument that requiring an "initial regulatory decision by the Commission [FCC] followed by review in the court of appeals makes eminent sense," because the District Court is supposedly ill-equipped to handle these types of cases. Opp. Brf. at 9. But the question of whether the FCC's prohibition of microbroadcasters like Fried is unconstitutional, as Petitioner asserts, can be decided based on the evidence presented to the District Court without the need for an "administrative record," as the Government asserts. *Id.* Indeed, the legislative history of 47 U.S.C. § 504, the forfeiture statute, indicates that Congress rejected a "review on the administrative record." *Pleasant Broadcasting*, 564 F.2d at 501; *see also* Petition at 16-19. It is common for District Courts to pass upon the legitimacy of regulations without a prior administrative record hearing and record. *See, e.g.*, 5 U.S.C. § 703 (establishing jurisdiction in the district court to review agency action where no special statutory review proceeding established); *Public Citizen v. F.T.C.*, 829 F.2d 149 (D.C. Cir. 1987) (holding that District Court proper forum for the review of smokeless tobacco regulations).

Incredibly, the Government also argues that Fried is responsible for the lack of a final order in this case from

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[3] Surprisingly, the Government continues to rely on *FCC v. ITT World Communications*, 446 U.S. 463, 468 (1984), which, as explained in the Petition (at 23 n.7), is completely inapposite to this case. Moreover, the other case relied upon by the Government, *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407 (1942), merely held that appellate review was appropriate in the first instance where no more specific special review jurisdictional statute mandated jurisdiction elsewhere. As Fried set forth in his Petition (at 20-24), a special jurisdiction statute such as § 504 trumps § 402, the statutory provision at issue in *Columbia Broad. Sys., Inc.*

which he can appeal. Opp. Brf. at 9-11. It claims that Fried could have either submitted an application for a license and a request for a waiver and then appealed an adverse decision to the Appeals Court *or* he could have petitioned for a rulemaking proceeding and mandamus the agency if it failed to act. *Id.* In making these arguments, the Government once again fails to recognize that *it* initiated this action against Fried. The Government, not Fried, chose a federal court proceeding as the place to determine Fried's rights. Fried raised his arguments as constitutional defenses, not as part of an original action against the FCC. No doubt many parties would love to prosecute actions while simultaneously denying the other party any defenses (while also suggesting that they seek to change the law in another forum). That, however, is not the law, and the Government cites no body of case law in support of this theory.

In addressing the Government's argument concerning the adequacy of Fried's waiver and license application, the Government seeks to relitigate the facts of this case at the Supreme Court level. Of course, such attempts should be rejected. The District Court presumed that Fried applied for a valid waiver (which, as pointed out in the Petition (at 9), the FCC never responded to, even though it was filed over four years ago). *See Laurel Avenue*, 207 F.3d at 461, A-7. In its attempt to challenge the established record in this case, the Government also foolishly suggests that in addition to making the waiver application, Fried should have also attached an application for a license. Such an application, however, would have flagrantly contradicted FCC regulations, which unambiguously stated: "[e]xcept in Alaska, no new Class D [microradio station] applications . . . are acceptable for filing. . . . " 47 C.F.R. § 73.512(c).

The Government's other alternative for Fried – petitioning the FCC for a change in the rules, and if the FCC did not act, petitioning for a writ of mandamus – is similarly inadequate. Of course, a defendant in an enforcement action is always free to seek a legislative or

administrative change in another forum rather than raising the unconstitutionality of the government's action as a defense, but petitioning for a change in the law is obviously no substitute for enforcement of one's rights in court. Moreover, as explained in the Petition (at 26-29), any ruling on a license application that impacts First Amendment rights must take place within a "specified, brief period" of time. *Freedman v. United States*, 380 U.S. 51, 59 (1965). The ability to bring a mandamus action after some unspecified period of inaction by the FCC has elapsed does not even come close to meeting the *Freedman* requirement that the application procedure be limited to a "specified, brief period." *Id.*

Finally, the Government argues, for the first time to Petitioner's knowledge, that 47 U.S.C. § 504(a) – the statutory provision at issue in the instant case and which provides for a trial *de novo* in district court – may in fact only apply to monetary forfeitures rather than property forfeitures at issue here. Opp. Brf. at 12. This assertion is directly contrary to the language of the subchapter at issue in this case. (For a more thorough review of the statutory provisions in this case, *see* Petition at 20-24). Subchapter V of the Communications Act provides for both monetary forfeitures and forfeitures of communication devices. In the instant case, the Government brought its action under § 510, but for the Government to enforce any type of forfeiture under the Communications Act, it must bring an action for the recovery of the forfeiture in District Court, pursuant to 47 U.S.C. § 504(a). Section 504(a) vests exclusive jurisdiction in the District Court to adjudicate forfeiture actions, and the statutory language could not be more clear: "The forfeitures provided for in this chapter . . . shall be recoverable . . . in the *district* where the person or carrier has its principal office. . . . *[A]ny* suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial *de novo*." (emphasis added).

The Government further claims that the "trial *de novo*" requirement "does not necessarily entail consideration of the validity of the FCC's low-power rules." Opp. Brf. at 12. The requirement of a trial *de novo*, however, by its very terms, contemplates a comprehensive consideration of the issues raised in the forfeiture, including any and all defenses asserted by Fried. *See, e.g., U.S.F.C.C. v. Summa Corp., Las Vegas, Nevada*, 447 F. Supp. 923, 925 (D. Nev. 1978) ("The words *'de novo'* mean that the Court should make an independent determination of the issues") (*quoting U.S. v. First City Nat'l Bank of Houston*, 368 U.S. 361, 368 (1967)); *State of Indiana v. Rethborg*, 396 N.E.2d 953, 955 (Ind. Ct. App. 1979), *reh'g denied* (1980) (in a trial *de novo*, "[a]ll questions may be presented which legitimately arise in the record").

Again, perhaps Fried's constitutional and other defenses would be successful, perhaps not, but that question is entirely irrelevant to the jurisdictional issue presented in this Petition: whether microbroadcasters are entitled to raise defenses when the Government initiates forfeitures actions in the District Court. This question, on which there is a clear split of authority among the circuits, does not require a determination of the merits of Fried's First Amendment claims. Fried and other microbroadcasters merely wish to have an opportunity to present defenses in District Court, as they are entitled to do under 47 U.S.C. § 504(a).

CONCLUSION

An unquestionable split of authority exists among the circuits on, as the court below recognized, "an important [question] for the statutory scheme created by Congress for the regulation of broadcasting" and a question on which there is no "precise precedent." *Laurel Avenue*, 207 F.3d at 462, A-11. The instant case provides the perfect opportunity for this Court to resolve this fundamental conflict and give much needed guidance to both the Government in its efforts to regulate broadcasting and to

small radio broadcasters who seek vindication of their First Amendment rights. For the reasons set forth in the Petition and this reply brief, Alan Fried respectfully urges this Court to grant his Petition.

Respectfully submitted,

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